2001

Robert E. Wilcox v. CSX Corporation : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

ROBERT E. WILCOX, Utah Insurance Commissioner, as Liquidator of Southern American Insurance Company, Plaintiff and Appellant, **vs.** CSX CORPORATION, Defendant and Appellee.	Case No. 20010411 Priority No. 15

Brief of the Appellee

Appeal from the Third District Court, Salt Lake County, Judge Glenn K. Iwasaki

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §§ 78-2-2(3)(j), 78-2a-2(3), because this is an appeal from a judgment of a court of record over which the Utah Court of Appeals does not have original appellate jurisdiction.

STATEMENT OF THE ISSUES

1. Did the trial court correctly determine that the payments by Southern American Insurance Company ("SAIC") to CSX Corporation ("CSX") in exchange for a release of CSX's current and future claims were for new and contemporaneous consideration and therefore not voidable preferences under Utah Code Ann. § 31A-27-321?

2. Should the trial court's grant of summary judgment for CSX be affirmed because the payments are not voidable preferences under Utah Code Ann. § 31A-27-321 because they (a) were made in the ordinary course of SAIC's business within 45 days of incurring the debts and according to normal business terms; and (b) were not for an antecedent debt.

Both issues were raised before the trial court through cross-motions for summary judgment. (R. 615-28.)

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c); see Nova Cas. Co. v. Able Constr., Inc., 1999 UT 69, ¶6, 983 P.2d 575. This Court reviews for correctness whether the trial court properly entered summary

judgment for CSX. See Nova Cas. Co., 1999 UT 69, at ¶6, 983 P.2d 575. Further, "'[i]n matters of pure statutory interpretation, an appellate court reviews a trial court's ruling for correctness and gives no deference to its legal conclusions.'" Valley Colour, Inc. v. Beuchert Builders, Inc., 944 P.2d 361, 363 (Utah 1997).

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 31A-27-102 (Supp. 2001). Definitions.

(1) As used in this chapter:

. . . .

(h) "Fair consideration" is given for property or an obligation:

(i) when in exchange for the property or an obligation, as a fair equivalent for it, and in good faith:

(A) property is conveyed;

(B) services are rendered;

(C) an obligation is incurred; or

(D) an antecedent debt is satisfied;

(ii) when the property or obligation is received in good faith to secure a present advance or an antecedent debt in amount not disproportionately small compared to the value of the property or obligation obtained.

. . . .

Utah Code Ann. § 31A-27-321 (1999). Voidable preferences and liens.

(1) (a) As used in this chapter, "preference" means a transfer of any of the property of an insurer to or for the benefit of a creditor, for or on account of an antecedent debt, made or allowed by the insurer within one year before the filing of a successful petition for rehabilitation or liquidation under this chapter, the effect of which transfer may enable the creditor to obtain a greater percentage of his debt than another creditor of the same class would receive. If a liquidation order is entered while the insurer is already subject to a rehabilitation order, transfers otherwise qualifying are considered to be preferences if they are made or allowed within one year before the filing of the successful petition for rehabilitation or within two years before the filing of the successful petition for liquidation, whichever time is shorter.

(b) Any preference may be avoided by the rehabilitator or liquidator, if:

(i) the insurer was insolvent at the time of the transfer;

(ii) the transfer was made within four months before the filing of the petition;

(iii) the creditor receiving it or to be benefited by it or his agent acting with reference to the transfer had, at the time when the transfer was made,

reasonable cause to believe that the insurer was or was about to become insolvent; or

(iv) the creditor receiving it was an officer, an employee, an attorney, or other person who was in fact in a position of comparable influence in the insurer to an officer, or any shareholder holding directly or indirectly more than 5% of any class of equity security issued by the insurer, or any other person with whom the insurer did not deal at arm's length.

. . . .

(4) The receiver may not avoid a transfer of property under this section for or because of:

(a) a new and contemporaneous consideration;

(b) the payment, within 45 days after a debt is incurred, of a debt incurred in the ordinary course of the business of the insurer and according to normal business terms;

(c) a transfer of a security interest in property to enable the insurer to acquire the property and which is perfected within ten days after the security interest attaches;

(d) a transfer to or for the benefit of a creditor to the extent that after the transfer, the creditor gave new value not secured by an unavoidable security interest and on account of which the insurer did not make an unavoidable transfer to or for the benefit of the creditor; or

(e) a transfer of a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all of those types of transfers to the transferee caused a reduction of the amount by which the debt secured by the security interest exceeded the value of the security interest four months prior to the date of liquidation or any time subsequent to the liquidation.

. . . .

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

This case arises from the liquidation of Southern American Insurance Company ("SAIC"). The liquidator of SAIC ("Liquidator") brought this action in the Third Judicial District Court for Salt Lake County, seeking to avoid and recover payments that CSX received from SAIC pursuant to a lawful settlement of claims relating to asbestos insurance coverage with SAIC. The Liquidator claimed that the settlement payments

constituted preferential transfers under Utah law and were subject to avoidance and recovery.

CSX moved for summary judgment, arguing, inter alia, that the payments were not avoidable preferences as a matter of law because they were made in exchange for new and contemporaneous consideration. The Liquidator opposed CSX's motion and submitted his own motion for summary judgment. After briefing and oral argument, the trial court ruled that the payments were not voidable preferences because they were for new and contemporaneous consideration as a matter of law. Accordingly, the court granted summary judgment in favor of CSX and denied the Liquidator's motion. The Liquidator appeals from the final judgment entered by the trial court.

Statement of Facts

SAIC is a Utah company in the business of providing insurance coverage and paying benefits to cover claims of policy holders. (R. 2, 38, 311.) SAIC was originally incorporated and began providing insurance coverage in 1934 in Tennessee. (R. 210.) In 1988, SAIC became domiciled in Utah. (R. 210.)

As part of its insurance business, SAIC sold third-party liability insurance policies to certain railroads that were predecessors of CSX.[1] (R. 237-38, 264-65.) These policies covered part of CSX's liability for asbestos exposure, including expenses incurred defending claims. (R. 251-52.) Under these policies, SAIC was obligated to indemnify CSX for "SUMS WHICH [CSX] SHALL BECOME LEGALLY OBLIGATED TO

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[1]The railroads actually were predecessors of, and SAIC actually made the payments at issue to, CSX Transportation, Inc., a subsidiary of CSX. (R. 234, 264.) However, for convenience in this brief, "CSX" refers to both defendant CSX Corporation and CSX Transportation, Inc., except as indicated.

PAY AS DAMAGES" (R. 333) and for "EXPENSES PAID OR INCURRED." (R. 334.) The policies provided that SAIC had no liability for payment to CSX until CSX had actually made its own payments on covered liabilities or expenses[2] and declared CSX would have no cause of action for indemnity until its liability was "FINALLY DETERMINED EITHER BY JUDGMENT AGAINST THE INSURED AFTER ACTUAL TRIAL OR BY WRITTEN AGREEMENT OF [CSX], THE CLAIMANT AND [SAIC]." (R. 339.) In 1985 the predecessor railroads, and in 1990 CSX, filed three separate lawsuits

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[2]One insurance policy provided:

> 6.6 THE COMPANY'S LIABILITY UNDER THIS POLICY WITH RESPECT TO ANY OCCURRENCE SHALL NOT ATTACH UNTIL THE AMOUNT OF THE APPLICABLE RETAINED OR OTHER INSURANCE LIMIT HAS BEEN PAID BY OR ON BEHALF OF THE INSURED ON ACCOUNT OF SUCH OCCURRENCE. THE INSURED SHALL MAKE CLAIM FOR ANY LOSS UNDER THIS POLICY AS SOON AS PRACTICABLE AFTER:
>
> (A) THE INSURED SHALL HAVE PAID ULTIMATE NET LOSS IN EXCESS OF THE RETAINED OR OTHER INSURANCE LIMIT WITH RESPECT TO ANY OCCURRENCE, OR
>
> (B) THE INSURED'S OBLIGATION TO PAY SUCH AMOUNTS SHALL HAVE BEEN FINALLY DETERMINED EITHER BY JUDGMENT AGAINST THE INSURED AFTER ACTUAL TRIAL OR BY WRITTEN AGREEMENT OF THE INSURED, THE CLAIMANT AND THE COMPANY.
>
> CLAIM FOR ANY SUBSEQUENT PAYMENTS MADE BY THE INSURED ON ACCOUNT OF THE SAME OCCURRENCE SHALL BE SIMILARLY MADE. ALL LOSSES COVERED BY THIS POLICY SHALL BE DUE AND PAYABLE BY THE COMPANY WITHIN 30 DAYS AFTER THEY ARE RESPECTIVELY CLAIMED AND PROVEN IN ACCORDANCE WITH THE TERMS OF THIS POLICY.

(R. 338-39.) A copy of this policy is contained in the Addendum as Exhibit 13.

(the "coverage suits") to collect coverage benefits relating to asbestos exposure under their SAIC policies.[3] (R. 264-65.)

Beginning at least as early as March 1991, CSX and SAIC entered into negotiations to settle the coverage suits.[4] (R. 251-66.) These negotiations were conducted at arms' length between counsel for CSX and SAIC. (R. 251-66.) From March 1991 until November 1991, the parties negotiated in good faith and exchanged approximately seven settlement offers and counteroffers. (R. 251-66.) During the negotiations, it was acknowledged by CSX and SAIC that future asbestos exposure claims could be raised by which CSX would suffer losses that were covered by the policies with SAIC. (R. 258-60.) At the time of the negotiations, SAIC estimated that covered losses to date approximated $109,000, (R. 258) and, although neither CSX nor SAIC could then ascertain what CSX's liability for future exposure claims would be,[5]

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[3]Those lawsuits were: The Chesapeake and Ohio Railway Company, et al. v. Certain Underwriters at Lloyd's, London, and London Market Insurance Companies, et al., Civil No. 85-3162 (D.D.C.), (filed Oct. 3, 1985); Western Maryland Railway Company v. Harbor Insurance Company, et al., Civil No. 85-3163 (D.D.C.) (filed Oct. 3, 1985); and CSX Transportation, Inc. v. Aetna Casualty and Surety Co., Civil No. 90-00015R (E.D. Va.) (filed Jan. 11, 1990).

[4]Copies of the correspondence demonstrating these negotiations are included in the Addendum as Exhibits 5 through 12.

[5]As acknowledged by the Liquidator's counsel during argument before the trial court, this uncertainty existed because there could have been asbestos exposure during the coverage period that would not give rise to asbestosis and claims against CSX until many years later. As counsel stated,

> [S]ome of the occurrences may have been such that we wouldn't have known, clear back in 1980, just how much money Southern American would owe. For example, if there had been a discharge of toxic chemicals, it might not yet be known what the cleanup costs would be. If there was exposure to asbestos, the asbestosis may not have yet fully

CSX estimated the amount of future losses covered by the SAIC policies would total $278,700. (R. 259.)

On October 14, 1991, CSX and SAIC reached a coverage settlement agreement ("Agreement") in which CSX released SAIC from all past, present, and future[6] claims that might arise from asbestos litigation. In return, SAIC agreed to pay CSX $308,000.00 in three installments. The Agreement provided in relevant part:

> In settlement of the coverage suits, the parties agree to the following payment provisions:
>
> 1. Southern will pay CSX the sum of $308,000.00 as follows:
>
> $102,667.00 on October 31, 1991
> $102,667.00 on November 30, 1991
> $102,666.00 on December 31, 1991
>
> This sum shall be in full satisfaction of any claim by CSX against the policies issued by Southern for any losses due to Asbestos-Related Claims past, present, or future, whether or not asserted in the coverage suits.
>
> 2. Southern shall not be liable to pay CSX for losses due to Asbestos-Related Claims other than as set forth in this Agreement.

> developed. But the occurrence itself would--the occurrence would've had to have happened in these years.

(R. 642 at 5.)

[6]Through the Agreement, SAIC joined the terms of CSX's September 19, 1988 settlement agreement with other insurers. (R. 470-511.) In distinction from SAIC's Agreement, CSX's settlement with the other insurers did not release CSX's rights to seek compensation for future losses due to future asbestos exposure claims. (R. 470, 474, 476-483.)

(R. 263-66, 470-72 (emphasis added).)[7] As agreed, SAIC issued checks to pay CSX in exchange for the release. In accordance with the settlement, SAIC issued a check for $102,667.00 on October 28, 1991, a second check for $102,667.00 on November 26, 1991, and a final check for $102,666.00 on January 2, 1992. (R. 267-82.) Likewise, as agreed, after these payments were made, CSX's claims against SAIC for losses already incurred related to asbestos exposure were dismissed. (R. 318, 515.) There is no claim or contention that the settlement payments were made for any reason other than as part of a fair, equitable settlement. CSX denies that SAIC was insolvent or that it had any knowledge or belief that SAIC was about to become insolvent. (R. 244.)

SAIC is currently in liquidation pursuant to a Liquidation Order entered on March 26, 1992. (R. 2.) On March 25, 1994, the Liquidator filed the present action against CSX Corporation, the parent company of CSX Transportation, claiming that the payments made by SAIC to CSX pursuant to the Agreement were avoidable preferences and were recoverable from CSX under Utah Code Ann. § 31A-27-321(1)(b) and (c). (R. 4-5.) On February 2, 2000, CSX moved for summary judgment, arguing the payments were not avoidable preferences as a matter of law upon the following grounds: (1) the payments were for new and contemporaneous consideration; (2) the payments were made in the ordinary course of SAIC's business according to usual business terms and within 45 days of the date they were legally obligated to be paid; and (3) the payments were not preferences because they were made in exchange for settlement of claims, including future claims that had not yet accrued, and were not made on account of any antecedent debt. (R. 188-272.) On March 30, 2000, the

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[7]A copy of the Agreement is found within Exhibit 12 of the Addendum.

Liquidator filed an opposition to CSX's motion and submitted his own motion for summary judgment, arguing the elements of a preferential transfer under section 31A-27-321 existed as a matter of law and addressing the grounds raised in CSX's motion. (R. 273-309.)

On March 5, 2001, the trial court heard oral argument on the cross motions for summary judgment. (R. 614.) On March 12, 2001, the court issued its memorandum decision wherein it ruled that the payments to SAIC were not voidable preferences because they were for new and contemporaneous consideration as a matter of law, (R. 615-628) and, on April 3, 2001, entered an order granting summary judgment in favor of CSX and denying the Liquidator's motion.[8] (R. 615-628.) Because the trial court's ruling resolved the case in its entirety, the court did not reach the additional issues before it. (R. 623.) The Liquidator timely appealed from the grant of summary judgment. (R. 631-32.)

SUMMARY OF THE ARGUMENT

I. The trial court correctly determined that the payments by SAIC were for new and contemporaneous consideration and not avoidable under the Utah Insurance Code.

The plain language of Utah Code Ann. § 31A-27-321(4) provides that transfers may not be avoided if made for new and contemporaneous consideration. Under well settled Utah law, there is consideration when a promisee receives any benefit or a promisor suffers any detriment. Here CSX gave up its right to prosecute and receive

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[8]The memorandum decision and order are found in the Addendum to Appellant's Brief as Exhibit C.

full payment on its existing claims and to be compensated for expenses and liability arising in the future. Consequently, the payments were for new and contemporaneous consideration.

This Court should reject the Liquidator's arguments that read the "new value" requirements of the Bankruptcy Code into the Utah Insurance Code. Because the Legislature chose to use the term "consideration" and rejected the concept of "new value," the statute requires only consideration as defined by Utah law. Nonetheless, the Liquidator's arguments, if accepted, are unavailing because CSX gave new value in exchange for the payments, including allowing SAIC to escape liability and litigation risks and expenses for claims that could have been asserted against CSX in the future, which enhanced SAIC's net worth possibly in excess of the amount paid to CSX.

This Court should reject the Liquidator's argument that the consideration was not new. The benefits SAIC received through the Agreement, including a reduced payoff on existing claims, saving the expenses and removing the risks of litigation, and insulating itself from liability for future claims, were only obtained through the agreement, not before. "New" is tied to consideration such that if there is consideration, it is by definition new. Further, there is no statutory requirement that consideration be in the form of goods, services, or money, or that the creditor prove the dollar value of the benefit conferred upon the insurer by such consideration. Rather, whether the consideration is sufficient is determined by the insurer's business judgment. Finally, CSX's future claims are not actually past claims by virtue of the coverage period ending before the Agreement because CSX and SAIC recognized that exposure to asbestos

within the coverage period could lead to asbestosis in the future and CSX had no right to indemnity under the policies until it actually incurred liabilities and expenses.

Likewise, the Court should reject the Liquidator's argument that the consideration was not contemporaneous. The payments were required through the same document that secured the benefits to SAIC, and were made as each corresponding debt was incurred and as SAIC received the benefits of the Agreement. The Liquidator is incorrect that a lack of contemporaneity necessarily follows from there having been an antecedent debt because such interpretation would render section 37A-27-321(4)(a) meaningless. Further, the debts here were incurred as they were paid and thus were not antecedent debts and the authority relied upon by the Liquidator is otherwise inapposite.

Finally, the trial court correctly ruled the payments were not avoidable notwithstanding the absence of an appraisal affixing the value of the consideration given by CSX. The Utah Insurance Code requires only that there be consideration, not a particular amount, and does not provide that a transfer is protected from avoidance only "to the extent" of the appraised value of the consideration.

II. Irrespective of whether the payments were for new and contemporaneous consideration, this Court should affirm summary judgment for CSX on the alternative grounds raised below because (a) the payments were made in the ordinary course of SAIC's business, within forty-five days of the debts being incurred, and for debts incurred according to normal business terms; and (b) the payments were not for antecedent debts.

First, the payments may not be avoided pursuant to the ordinary course of business exception in Utah Code Ann. § 37A-27-321(4)(b). A debt is not incurred until the debtor is obligated to make payment. Hence, these debts were incurred as each payment came due under the Agreement and each payment was made within forty-five days of coming due. Indeed, the first two payments were made within forty-five days of the Agreement itself and, because SAIC could not have been obligated to pay CSX's future claims until CSX's liability and losses were actually incurred, the debts could not have been incurred prior to execution of the Agreement. Further, because SAIC is an insurer, the debts were incurred in the ordinary course of SAIC's business of evaluating insureds' claims, settling those claims, and making payments according to those settlements. Finally, the debts were incurred and payments made according to normal business terms because the Agreement was a run-of-the-mill transaction for an insurer and the payments were made according to the terms of the Agreement. Consequently, the payments are within the ordinary course of business exception of section 37A-27-321(4)(b) and may not be avoided.

Second, the payments are not preferences because they were not for an antecedent debt. The Agreement insulated SAIC from all liability for CSX's future losses that had not and could not yet be asserted. These uncertain and unliquidated claims cannot constitute antecedent debt. Rather, because debts are not incurred until the debtor is obligated to pay and these payments were made as obligated, the debts were not antecedent and the payments, therefore, are not preferences.

III. The proper disposition is to affirm the grant of summary judgment for CSX. If, however, the Court determines the trial court erred and rejects CSX's alternate

grounds raised below, the proper disposition is to remand the case without direction so that the trial court may consider the issues raised but not reached.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE LIQUIDATOR MAY NOT AVOID SAIC'S PAYMENTS TO CSX BECAUSE SAIC MADE THE PAYMENTS IN EXCHANGE FOR NEW AND CONTEMPORANEOUS CONSIDERATION.

A. Under the Plain Language of Utah Code Ann. § 31A-27-321, SAIC's Payments to CSX Constitute New and Contemporaneous Consideration and May Not Be Avoided.

This Court should affirm the trial court's grant of summary judgment because it correctly determined that the payments to CSX were for new and contemporaneous consideration. Section 31A-27-321(4)'s plain language provides that SAIC's payments are not avoidable preferences because they were made in exchange for new and contemporaneous consideration.[9] "This court looks first to the plain language of a statute when deciding questions of statutory interpretation and assumes that each term was used advisedly by the Legislature." Biddle v. Washington Terrace City, 1999 UT 110, ¶14, 993 P.2d 875. "Only if we find some ambiguity[10] need we look further." Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108, 1112 (Utah 1991). This Court gives effect to each term used by the Legislature "according to its ordinary and accepted meaning." Utah State Bar v. Summerhayes & Hayden, Pub. Adjusters, 905 P.2d 867, 871 (Utah 1995).

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[9]As discussed below, the Liquidator ignores the plain language of the statute, arguing instead that this Court should construe the statute to effect the purposes of the federal Bankruptcy Code, which uses different language.

[10]The Liquidator has pointed to no ambiguity in the statute's use of "a new and contemporaneous consideration." Utah Code Ann. § 31A-27-321(4)(a).

"Consideration" is: "The cause, motive, price or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." Blacks Law Dictionary 306 (6th Ed. 1990); see also Coulter & Smith, Ltd. v. Russell, 966 P.2d 852, 859 (Utah 1998) ("'Consideration is "an act or promise, bargained for and given in exchange for a promise."'") (citation omitted). This Court has expressly stated that "consideration may be found 'whenever a promisor receives a benefit or where [a] promisee suffers a detriment, however slight,'" In re Estate of Beesley, 883 P.2d 1343, 1351 (Utah 1994) (citation omitted) (alteration in original), and has long held that a release or settlement of an unliquidated or disputed claim provides sufficient consideration for a binding agreement. See Browning v. Equitable Life Assur. Soc., 72 P.2d 1060, 1068 (Utah 1937); see also Wood Realty Trust v. N. Storonslee Cooperage Co., 646 N.Y.S.2d 410, 411 (N.Y. App. Div. 1996) ("Discontinuance of a pending action, release or promise to forego future litigation can constitute valid consideration.").

CSX gave valuable new consideration in exchange for the payments. Such consideration included accepting payment in an amount lower than that to which CSX was initially entitled, losing its right to obtain enforceable judgments, appeal any errors occurring at trial, and to obtain writs of execution on those judgments. In so doing, CSX gave SAIC the significant benefit of resolving the claims, avoiding judgments being entered against it, and saving the expense of litigation. Moreover, SAIC removed its liability for all claims encompassed within the coverage period that could have been

brought in the future. Under Utah law, this constitutes new and contemporaneous consideration precluding the Liquidator from avoiding the payments.[11]

Indeed, CSX's agreement with SAIC satisfies the definition of "consideration" provided by the Utah Insurance Code through its definition of "fair consideration":

> "Fair consideration" is given for property or an obligation:
> (i) when in exchange for the property or an obligation, as a fair equivalent for it, and in good faith:
> (A) property is conveyed;
> (B) services are rendered;
> (C) an obligation is incurred; or
> (D) an antecedent debt is satisfied;
> (ii) when the property or obligation is received in good faith to secure a present advance or an antecedent debt in amount not disproportionately small compared to the value of the property or obligation obtained.

Utah Code Ann. § 31A-27-102(1)(h) (Supp. 1999). By parsing out the language defining "fair," this subsection shows a definition of "consideration" that encompasses the instant facts because CSX incurred an obligation—e.g., CSX must release current and future claims and accept reduced payment— and satisfied an antecedent debt—e.g., canceling the original debt owed for claims under the policies. See Utah State Bar, 905 P.2d at 871 ("[W]ords and phrases used in a statute, if also defined by

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[11]Even under the narrower language used by the Bankruptcy Code, it has been held that a release of claims and termination of a lawsuit through a settlement agreement may be "new value" precluding the payment in a contemporaneous exchange from being avoided. See Lewis v. Diethorn, 893 F.2d 648, 650 (3rd Cir. 1990); Nelson Co. v. Amquip Corp., 128 B.R. 930, 935 n.13 (E.D. Pa 1991) (stating transfer was contemporaneous exchange for new value and explaining "[defendant] exchanged $349,734.32 in principal for $291,712.46 in principal, plus the bonus of a litigation free environment (or so it thought, until [debtor] sought to avoid the transfer)"); cf. In re Vitreous Steel Prods. Co., 911 F.2d 1223, 1238 n.6 (7th Cir. 1990) (recognizing that "equivalent value" demonstrating transfer was not fraudulent under Bankruptcy Code § 548 "could be the release of a just claim against the corporation"). As the Lewis court explained, what the party received "was not the freedom from liability on an antecedent debt, but the freedom from the risk of litigation." Lewis, 893 F.2d at 650.

statute, must be construed according to that definition.") (citing Utah Code Ann. § 68-3-11 (1993)). Such definition is in accordance with settled Utah case law defining consideration.

Accordingly, it is clear that the trial court correctly determined that the payments to CSX were for new and contemporaneous consideration and this Court should affirm the grant of summary judgment for CSX.

B. This Court Must Reject the Liquidator's Flawed Analysis That Defeats the Statute's Plain Language by Writing in New Requirements from the Federal Bankruptcy Code.

The Liquidator ignores the statute's language and instead relies erroneously on bankruptcy cases interpreting the different language of the Bankruptcy Code to argue there was no new and contemporaneous consideration exchanged for the payments. The Utah Code, however, provides that payments may not be avoided if they were for "new and contemporaneous consideration," Utah Code Ann. § 31A-27-321(4)(a) (1999) (emphasis added), whereas the Bankruptcy Code describes the limit on avoidance as "a contemporaneous exchange for new value." 11 U.S.C.A. § 547(c)(1) (West 1993) (emphasis added). This Court must respect the Legislature's decision to use the word "consideration" and may not accept the Liquidator's invitation to rewrite the statute according to the language used in the Bankruptcy Code.[12]

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[12]CSX agrees with the Liquidator that the preference statute serves the general purpose of ensuring that one creditor does not receive a share of the liquidation estate disproportionate to that received by similarly situated creditors. Nonetheless, the Legislature has balanced the competing interests and implemented the best mechanism in its judgment to achieve such purpose. The Legislature determined that a creditor does not receive a disproportionate share if it provides consideration for the transfer. Hence, the Legislature determined that the liquidation estate is not diminished to the detriment of other creditors because the estate receives the new consideration and entrusted the decision of whether the consideration is sufficient to warrant the deal

Section 31A-27-321 is analogous to the Bankruptcy Code.[13] However, the Legislature chose to describe the preference avoidance exception of section 31A-27-321(4)(a) as requiring "consideration," a term of art, rather than "value" as used in the Bankruptcy Code.[14] Such usage clearly demonstrates an intent to reject the Bankruptcy Code's "value" requirements and instead require only "consideration" with its concomitant meaning. As this Court stated, "statutory construction presumes that the expression of one [term] should be interpreted as the exclusion of another." Biddle, 1999 UT 110, at ¶ 14; see also Westside Community Sch. v. Mergens, 496 U.S. 226, 242 (1990) ("Congress was presumably aware that [this language], as used by the Court, is a term of art, and had it intended to import that concept into the act, one would suppose that it would have done so explicitly. Indeed, Congress' deliberate choice to use a different term . . . can only mean that it intended to establish a [different] standard . . . .") (citation omitted). The Legislature's intent is underscored by the fact that in section 321, a mere three subparts following the language at issue, the

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to the sound business judgment of the insurer.

[13]The Utah Insurance Code expressly recognizes the Bankruptcy Code. See Utah Code Ann. § 31A-27-411 (1999) (providing for severability when statute is superseded by the federal Bankruptcy Reform Act of 1978).

[14]The Bankruptcy Code describes the avoidance exception as follows:

> The trustee may not avoid under this section a transfer –
> (1) to the extent that such transfer was –
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
> (B) in fact a substantially contemporaneous exchange . . . .

11 U.S.C.A. § 547(c) (West 1993). A copy of section 547 is included in the Addendum as Exhibit 4.

Legislature described another limit on avoiding preferences using the term "value" instead of "consideration," demonstrating that "consideration" in Utah's statute is distinct from "value" in the Bankruptcy Code and that the Legislature is competent to choose statutory language advisedly. See Utah Code Ann. § 31A-27-321(4)(d).

As recognized by one of the authorities on which the Liquidator relies, In Re Aero-Fastener, Inc., 177 B.R. 120 (Bankr. D. Mass. 1994), the language "value" in section 547(c)(1) of the Bankruptcy Code, is narrowly defined and "demands a more exacting or rigid measure of benefit conferred on the debtor." Id. at 138 (recognizing that "value" for purposes of § 547(c)(1) is manifestly narrower than the definition for purposes of 11 U.S.C. § 548, which concerns fraudulent conveyances). This rigor does not apply to the meaning of "consideration" used in the statute at issue here.

Moreover, the Bankruptcy Code expressly defines the requisite new value to exclude an obligation substituted for an existing obligation, i.e., a settlement agreement. See 11 U.S.C.A. § 547(a)(2) (West 1993) (providing that "new value . . . does not include an obligation substituted for an existing obligation"); In re Ottawa Cartage, Inc., 55 B.R. 371, 376-77 (N.D. Ill. 1985) (stating that this definition excluded a stipulation to refrain temporarily from pursuing a lawsuit). Utah's Insurance Code contains no such limitation.

Finally, the Agreement would even satisfy the Bankruptcy Code's requirement of new value. Prior to the Agreement, CSX had claims approximating $109,000. With respect to those claims, through the Agreement, SAIC saved the costs of litigation and benefited, inter alia, from removal of the risk that a judgment would be entered against it. In addition, at the time of the agreement, both SAIC and CSX knew there would

likely be future claims asserted against CSX that would be covered by the SAIC policies. CSX estimated SAIC could be liable for $278,700, and the actual amount could have been higher. In exchange for SAIC's payments, under the Agreement, SAIC escaped this liability as well as any costs it would have incurred in a subsequent action brought by CSX. Irrespective of the benefit SAIC received with respect to past and present claims, such liability and costs regarding future claims alone could have surpassed the $308,000 paid to CSX, and the Agreement thus correspondingly enhanced SAIC's liquidation estate. Hence, even under the Bankruptcy Code, the payments were for "new value" and are not avoidable preferences.

In sum, under the plain language used by the Legislature, the payments may not be avoided by the Liquidator because they were exchanged for new and contemporaneous consideration. As used by the Utah Insurance Code, only consideration—not the Bankruptcy Code's concept of new value—is required and the settlement agreement here constituted such new and contemporaneous consideration. Nonetheless, even under the Bankruptcy Code, the payments were for new value and are not avoidable preferences. Consequently, as a matter of law, the payments may not be avoided and this Court should affirm the grant of summary judgment for CSX.

C. The Consideration Exchanged by CSX for the Payments Was "New" and "Contemporaneous."

This Court should reject the Liquidator's strained argument by which he asserts that the consideration given by CSX in exchange for the payments was neither new nor contemporaneous.

1. The Consideration Given by CSX Was "New."

The Liquidator argues that although the Agreement was supported by consideration, SAIC received nothing "new." This argument is a complete red herring. Before the Agreement, CSX had the right to prosecute its existing claims against SAIC, obtain a judgment, and execute on that judgment. CSX further had a right to seek compensation from SAIC for liability and expenses on all new asbestos exposure claims as they were incurred. After the Agreement, CSX had no such rights, SAIC escaped the costs of defending the previously pending actions, and SAIC removed all of its responsibility for CSX's future liability and expenses. Because SAIC received these significant benefits only through the Agreement in exchange for the payments, the consideration was new.

Indeed, by admitting that there was consideration, the Liquidator necessarily admits it was new because there simply is no consideration without it being new. "Events which occur prior to the making of the promise and not with the purpose of inducing the promise in exchange are viewed as 'past consideration' and are the legal equivalent of 'no consideration.'" Dementas v. Estate of Tallas, 764 P.2d 628, 633 (Utah Ct. App. 1988) (quoting 1 A. Corbin, Corbin on Contracts § 210 (1963)); accord Jensen v. Anderson, 24 Utah 2d 191, 468 P.2d 366, 368 (1970) ("'The doctrine that past consideration is no consideration represents the overwhelming weight of authority and is almost universally followed. This has been the law since early times.'") (citation omitted). Hence, "new" is inexorably intertwined with whether consideration itself exists. If there was nothing "new" obtained by SAIC through the Agreement, there was by definition no consideration and, conversely, if there was consideration, it was by

definition "new." Consequently, because, as described above, CSX provided consideration for the Agreement in exchange for the payments, by definition the consideration was new.

The Liquidator's argument that the consideration provided by CSX must measurably enhance SAIC's net worth in terms of goods, services, or money is without support. There is no such requirement in the statute. First, unlike the Bankruptcy Code,[15] the Utah statute does not require "new and contemporaneous goods, services, or money." Second, the statute requires only that there be consideration, not "sufficient" consideration to enhance the estate in the eyes of the liquidation court. Indeed, such a requirement would be antithetical to Utah law under which courts will not pass on the sufficiency of consideration provided consideration exists. See In re Estate of Beesley, 883 P.2d at 1351 ("[C]onsideration may be found 'whenever a promisor receives a benefit or where [a] promisee suffers a detriment, however slight.'") (citation omitted) (second alteration in original) (emphasis added); Dementas, 764 P.2d at 632 ("'[A]s a general rule it is settled that any detriment no matter how economically inadequate will support a promise.'") (citation omitted). Ensuring it would not have to compensate CSX in the future for claims not yet asserted but arising during the

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[15]The Bankruptcy Code defines "new value" as

> money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation . . . .

11 U.S.C.A. § 547(a)(2) (West 1993) (emphasis added).

coverage period was a benefit to SAIC.[16] The record shows that CSX estimated its future covered losses could exceed $278,000. Whether the benefit to CSX justified making the payments in a business sense was SAIC's decision and should not be second-guessed by the courts. See, e.g., Dementas, 764 P.2d at 632 ("'If Tallas thought it was worth 50,000 bucks to get one ride to Bingham, that's Tallas' decision . . . . The only thing you can't do is take it with you.'").

The Liquidator states that no future claims could have arisen after the Agreement because the coverage period ended in 1982. This is simply not true. The Agreement was not a mere payment plan for CSX's past claims. As the Liquidator's counsel recognized during oral argument before the trial court, at the time of the Agreement, a person could have been exposed to asbestos within the coverage period yet not develop asbestosis for many years. If that person brought an action against CSX after execution of the Agreement, because of the Agreement SAIC would not have to reimburse CSX for the liability and costs incurred through that action, despite that the liability and costs would be covered by the policies. Further, just as the asbestos-exposed potential plaintiff could not bring an action against CSX until some injury could be shown, CSX could not seek reimbursement under the policy until liability and costs were actually incurred. See, e.g., In re White River Corp., 799 F.2d 631, 632 (10th Cir. 1986) ("[A] debt is incurred when a debtor first becomes legally obligated to pay . . . ."); Valley Colour, Inc. v. Beuchert Builders, Inc., 944 P.2d 361, 364 (Utah 1997) (holding cause of action did not accrue until damages were incurred and stating, "'The true test

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[16]CSX gave SAIC the right to enforce CSX's forebearance from pursuing its claims. CSX did not unilaterally choose to forebear enforcement and thus was not "merely exercising a pre-existing right." (Appellant's Br. at 14.)

in determining when a cause of action arises or accrues is to establish the time when the plaintiff could have first maintained the action to a successful conclusion.'") (citation omitted); Myers v. McDonald, 635 P.2d 84, 86 & n.3 (Utah 1981) ("[T]he general rule is that a cause of action accrues upon the happening of the last event necessary to complete the cause of action.").

Consequently, the record is clear that the trial court correctly concluded that the payments were for new consideration.

2. The Consideration Given by CSX Was "Contemporaneous."

The consideration given by CSX was clearly contemporaneous. The payments were required to be made in the very document securing the benefit for SAIC, and the payments were made shortly thereafter as each debt was incurred and as SAIC secured the right to enforce the Agreement. Because SAIC received the benefit of the Agreement and the corresponding enhancement to its net worth as the payments were made, no delay defeated the legitimate expectations of other creditors and the consideration was therefore contemporaneous. See PineTop Ins. Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n., 969 F.2d 321, 328-29 (7th Cir. 1992) (holding that transfers were contemporaneous under Illinois liquidation statute and therefore were not avoidable transfers); cf. In re Stephens, 242 B.R. 508, 511 & n.2 (D. Kan. 1999) (affirming ruling, in bankruptcy context, that exchange was contemporaneous and transfer not avoidable and stating that "'[c]ontemporaneous' is defined as 'existing or occurring during the same time (as during a year, decade, or longer span of time)' or 'originating, arising, or being formed or made at the same time: marked by

characteristics compatible with such origin.'") (quoting Webster's Third New Int'l Dictionary (1961)).

The Liquidator's argument that if a payment was for an antecedent debt it ipso facto is not contemporaneous consideration turns the statute on its head. As discussed below, these payments were payments on the debts created by the Agreement that were incurred as each payment came due, not for the original claims on the policies, and thus were not for antecedent debts. See infra, Part II.B. Further, even if they were on account of an antecedent debt, that inquiry is only a prima facie requirement for classifying a payment as a "preference." Although there is overlap between the two concepts, once a payment is classified as a preference, the statute still allows a defense to avoidance if, although on account of an antecedent debt, it is made for new and contemporaneous consideration. Hence, the Liquidator's analysis must be rejected because it would effectively repeal this statutory defense in its entirety. See Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108, 1112 (Utah 1991) (rejecting interpretation of statute that would effectively read out another subpart of statute and stating "the general rule that we should construe statutory provisions so as to give full effect to all their terms, where possible").

Finally, even assuming that the cases on which the Liquidator relies to argue the consideration was not contemporaneous interpreted the same language used by the Utah Insurance Code, they are factually inapposite and do not stand for the proposition that a formalized enforceable agreement to release existing and future claims and accept sums lower than those currently due cannot constitute new and contemporaneous consideration. In each case, the payments at issue were made on

an old debt whereas SAIC's payments were made for a new bargain. In particular, the Liquidator's reliance on In re Ottawa Cartage, Inc. is misplaced because there the creditor merely delayed its suit temporarily, providing no other value to the debtor, whereas here there was an express agreement wherein SAIC specifically bargained for the forebearance and other consideration. See In re Ottawa Cartage, Inc., 55 B.R. at 376; see also In re Barefoot, 952 F.2d 795, 800 (4th Cir. 1991) (holding subsequent payment to make good a bad check, without such payment being required by subsequent settlement agreement containing new consideration, was not a contemporaneous exchange); In re Pan Trading Corp., 125 B.R. 869, 875-76 (Bankr. S.D.N.Y. 1991) (concluding, without addressing contemporaneity, that payment on debt was not for new value in case where no subsequent settlement agreement was entered).

In sum, the Liquidator's arguments that the consideration was not contemporaneous are without merit. The payments by SAIC were clearly made for new and contemporaneous consideration given to SAIC and the trial court therefore correctly granted summary judgment for CSX. Accordingly, this Court should affirm.

D. The Court Correctly Ruled the Payments Were for New and Contemporaneous Consideration Without an Appraisal of the Future Claims Released by CSX.

This Court should reject the Liquidator's argument that an appraisal is required to find new and contemporaneous consideration under section 31A-27-321(4)(a) of the Utah Code. (Appellant's Br. Part IV.) The Liquidator cites no Utah authority to support his argument, including the statute itself. Again, the statute provides, "The receiver may not avoid a transfer of property under this section for or because of: (a) a new and

contemporaneous consideration . . . ." Utah Code Ann. § 31A-27-321(4). The Code simply contains no requirement that the consideration exchanged be appraised and weighed by a court to assess whether, in the court's view, it was sufficient to justify the exchange. Such weighing of the sufficiency of consideration by a court is inappropriate. See In re Estate of Beesley, 883 P.2d at 1351; Dementas, 764 P.2d at 632. Under Utah's Insurance Code, the question is only if there is consideration, not how much.

The bankruptcy cases relied upon by the Liquidator are inapposite as interpreting distinct language of the Bankruptcy Code. The Bankruptcy Code provides, "The trustee may not avoid under this section a transfer – (1) to the extent that such transfer was – intended . . . to be a contemporaneous exchange for new value . . . ." 11 U.S.C.A. § 547(c) (West 1993) (emphasis added). Clearly, under this language, Congress requires bankruptcy courts to assess how much new value was provided to a debtor in exchange for a transfer. The language explicitly provides that a preference is insulated from avoidance only to the extent of the new value; the Utah Code has no corresponding provision. In distinction, the Utah Code asks only the yes or no question: Was the transfer for consideration? If the answer is yes, as it is here, the transfer may not be voided.

Accordingly, the trial court correctly ruled that CSX gave new and contemporaneous consideration and that the payments may not be avoided as a matter of law notwithstanding the absence of an appraisal. Consequently, this Court should affirm the grant of summary judgment for CSX.

II. THIS COURT SHOULD AFFIRM THE GRANT OF SUMMARY JUDGMENT BECAUSE SUMMARY JUDGMENT FOR CSX IS WARRANTED AS A MATTER OF LAW UPON THE REMAINING GROUNDS ASSERTED BY CSX BELOW.

The trial court correctly determined the payments to CSX were for new and contemporaneous consideration. Nonetheless, this Court should affirm the grant of summary judgment also based upon the additional grounds raised by CSX below. It is well settled that this Court "may affirm a grant of summary judgment on any ground available to the trial court, even if it is one not relied on below." Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). Moreover, for this Court to do so, it is not necessary for CSX to have brought a cross-appeal. See Nova Cas. Co. v. Able Constr., Inc., 1999 UT 69, ¶7, 983 P.2d 575. Consequently, summary judgment should be affirmed because the payments to CSX were (a) made within forty-five days after a debt was incurred, for a debt incurred in the ordinary course of SAIC's insurance business, and for a debt incurred according to normal business terms; and (b) not for an antecedent debt.

A. The Payments May Not Be Avoided Because They Were Made In The Ordinary Course Of SAIC's Insurance Business As Payment Of Debts Within Forty-Five Days Of Their Incurrence And According To Normal Business Terms.

The liquidator may not avoid the payments because they were made within forty-five days after the debts were incurred, they were made for debts incurred in the ordinary course of SAIC's insurance business, and because they were incurred according to normal business terms. See Utah Code Ann. § 31A-27-321(4)(b) (1999).

Section 31A-27-321 of the Utah Insurance Code provides that the Liquidator "may not avoid a transfer" of "the payment, within 45 days after a debt is incurred, of a debt incurred in the ordinary course of the business of the insurer and according to

normal business terms." Utah Code Ann. § 31A-27-321(4)(b) (1996). Because SAIC's payments to CSX meet each of these elements, the Liquidator may not avoid or recover them and this Court should affirm the grant of summary judgment for CSX.

First, each payment was made within forty-five days of the date it was due under the Agreement. A debt is "incurred" as of the date the debtor is legally obligated to pay it. See In re White River Corp., 799 F.2d 631, 632 (10th Cir. 1986); In re Pan Trading Corp., 125 B.R. at 875; In re Caceres Johnson P. R., 91 B.R. 200, 202 (D.P.R. 1988); In re Energy Coop., 103 B.R. 171, 174 (N.D. Ill. 1986). In In re White River, the 10th Circuit examined the similar exception in the Bankruptcy Code[17] to determine when debts for monthly payments due under a lease were incurred. The court rejected the trustee's argument that the entire debt was incurred upon execution of the lease. As the court stated: "[T]he debt was not incurred when the lease obligation was executed because the total lease obligation was not then due and payable. We hold that the debts were incurred under the lease in monthly increments on the actual dates the rent was due." In re White River Corp., 799 F.2d at 633.

Similarly here, the debts were not incurred when the policies were issued nor when a potential claimant was exposed to asbestos because under the policies' terms SAIC had no obligation to make payment until CSX had actually incurred liability and expenses with respect to each individual claimant. Further, the debts were not incurred upon the signing of the Agreement because SAIC was not then obligated to pay.

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[17]The 45 day requirement was removed from the Bankruptcy Code by a 1984 amendment. The In re White River Corp. court considered the statute in effect before that amendment. See In re White River Corp., 799 F.2d at 632 (quoting 11 U.S.C. 547(c)(2)(B) (1982)).

Rather, the debts for which the payments were made were incurred when actually due under the Agreement. Thus, under the terms of the Agreement, SAIC incurred debts to CSX on October 31, 1991, November 30, 1991 and December 31, 1991. See also In re Gold Coast Seed Co., 751 F.2d 1118, 1119 (9th Cir. 1985); In re Iowa Premium Serv., 695 F.2d 1109, 1111-12 (8th Cir. 1982) (en banc). SAIC met its legal obligations and made the payments of the debts on October 28, 1991, November 26, 1991 and January 2, 1992, respectively, clearly within the forty-five-day limit imposed by the insurance code. See In re White River Corp., 799 F.2d at 633 (holding "that a transfer occurs upon delivery of the check."); see also Barnhill v. Johnson, 503 U.S. 393, 402 n.9, 112 S.Ct. 1386, 1391 n.9 (1992) (noting "[t]hose Courts of Appeals to have considered the issue are unanimous in concluding that a date of delivery rule should apply to check payments for purposes of § 547(c)"). Consequently, SAIC paid each of its three debts to CSX within forty-five days after incurring them.

Further, even if the debt arose upon entry of the Agreement, the first two payments are not avoidable as being made within forty-five days after the debt was incurred. The payments were not made for the original claims brought by CSX; such claims were enforceably abandoned when CSX entered the Agreement with SAIC. Rather, the payments were made upon the Agreement dated October 14, 1991. To form a contract there must be "'[a]n acceptance [that] unconditionally assent[s] to all material terms presented in the offer, including price and method of performance.'" Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶27, 989 P.2d 1077. Unconditional assent to all material terms did not occur until execution of the October 14, 1991 letter. In the October 14, 1991 Agreement, signed by CSX on October 17,

1991 and by SAIC on October 25, 1991, the parties entered a formal settlement agreement resolving their claims and providing for payment on given days for fixed amounts. Consequently, at the earliest, the new debt arose on October 14, 1991. As a result, assuming the debts were incurred at that time, the two initial payments made October 28, 1991 and November 26, 1991 were made within forty-five days after the debt was incurred.

Second, the debts were incurred and payments were made under the Agreement in the ordinary course of SAIC's business as an insurer. The "ordinary course of business" refers to a company's normal or standard business practices. SAIC, as an insurance company since 1934, has long been in the business of providing insurance coverage and making payments in settlement of the claims of its insureds. The settlement with CSX was no different than the no doubt thousands of similar settlements made by SAIC throughout its history. Thus, SAIC made the payments in the ordinary course of its business as an insurer.

Debts pursuant to settlement agreements are not per se outside the ordinary course of business. While this may be true in the cases the Liquidator relied upon below wherein the debtor's ordinary course of business did not involve regularly paying disputed claims, it is not true in the insurance industry for which the heart of its ordinary course of business is to review, settle, and pay claims for insurance. See, e.g., In re Valley Steel Prods. Co., 214 B.R. 202, 207 (E.D. Mo. 1997) (debt for unpaid taxes was not in steel company's ordinary course of business); In re Florence Tanners, Inc., 184 B.R. 520, 522 (Bankr. E.D. Mich. 1995) (settlement for sexual discrimination lawsuit was not within ordinary course of debtor's business). Rather, determining whether a

debt was incurred in the ordinary course of business requires an examination of the practices in that particular industry; merely because a debt is not typically incurred by most industries does not foreclose it from being incurred in the ordinary course of business with the individual industry at issue. See Fidelity Sav. & Inv. Co. v. New Hope Baptist, 880 F.2d 1172, 1177 (10th Cir. 1989). Hence, because SAIC was in the insurance business and the insurance business necessarily entails evaluating claims by insureds, settling those claims, and making payments on those new debts incurred through settlement, the debts here were clearly incurred in the ordinary scope of SAIC's business.

Finally, the debts were incurred and payments were made according to normal business terms. In this case, the Agreement, the negotiations between SAIC and CSX as evidenced by the parties' correspondence, and the payments themselves indicate nothing other than a regular, fair and proper settlement. See Fidelity Sav. & Inv. Co. v. New Hope Baptist, 880 F.2d 1172, 1177-78 (10th Cir. 1989) (transfers not voidable under Bankruptcy Code; they were "conducted in a regular manner, pursuant to the terms of the certificates, and without any indication that the corporation was having financial difficulties"). Again, because an insurance company is engaged in the business of reviewing claims, settling claims, and making payments for debts established through such settlement agreements, the payments here were necessarily within the normal terms of those engaged in by SAIC. At a minimum, they were within the permissible range necessary to establish that the payments may not be avoided. See In re Molded Acoustical Prods., Inc., 18 F.3d 217, 220 (3rd Cir. 1994) (""[O]rdinary business terms" refers to the range of terms that encompasses the practices in which

firms similar in some general way to the creditor in question engage and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of [normal business terms].'") (citations omitted) (emphasis in original). The payments were made exactly as provided for in the Agreement, and it is plain that normal business terms were followed in the Agreement.

In sum, because SAIC made the payments in the ordinary course of its insurance business, according to normal business terms and within forty-five days of incurring its debts to CSX, as a matter of law, the Liquidator may not avoid or recover the payments. Consequently, on this independent ground, this Court should affirm the grant of summary judgment for CSX.

B. The Payments May Not Be Avoided Because They Were Not For An Antecedent Debt.

Finally, the Liquidator may not avoid or recover the payments because the payments were made as settlement of claims, including future claims, and were not made on account of any antecedent debt. For a payment to be avoidable under the Utah Insurance Code, it must have been "for or on account of an antecedent debt." Utah Code Ann. § 31A-27-321(1)(a) (1996). If not made to satisfy such antecedent or pre-existing debt, the payment is not a "preference" as defined by the statute and is not avoidable or recoverable. See id. It is undisputed that the terms of the Agreement release SAIC from liability "for any losses due to Asbestos-Related Claims past, present, or future, whether or not asserted in the coverage suits." By its plain terms, the Agreement incorporates a release of future claims – that is, claims that have not yet arisen, could not yet have arisen, and may never in fact actually arise. No stretch of logic could make such contingent, unrealized potential claims into "antecedent debt"

within the meaning of the statute. Such potential claims cannot be pre-existing and are thus not "antecedent."[18] Therefore, the payments were not made for any antecedent debt and thus are not preferential transfers.

The Liquidator erroneously asserts that the payments were made for an antecedent debt. In arguing the payments were not for contemporaneous consideration, the Liquidator argues that the debts arose when CSX first had a claim for payment against SAIC although such claim may be contingent, unmatured, or unliquidated. Even assuming the debts were based solely on the original policy, the payments here were not made for any debt thereunder. Rather, the payments were made in satisfaction of the debt created by the Agreement.

In Lewis v. Diethorn, 893 F.2d 648 (3rd Cir. 1990), the debtor entered a settlement agreement with a creditor regarding a debt for work it performed. See id. at 649. The creditor agreed to discontinue suit, remove a lis pendens, and make a payment. The bankruptcy trustee sought to avoid the payment. Id. The Third Circuit Court of Appeals, concluded that the payment does not meet the statutory preference requirements because "it was not 'for or on account of an antecedent debt owed by the debtor before such transfer was made.'" Id. at 650 (quoting 11 U.S.C. § 547(b)(2)). Consequently, the court determined that the settlement agreement, in exchange for the

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[18]The Liquidator asserts that because CSX is within the definition of a "creditor" any payment must have been for an antecedent debt. (Appellant's Br. at 18.) In fact, however, there is no connection between the two; the statute separately defines a creditor and what constitutes a preference and does not provide that any payment is for an antecedent debt merely because it was made to a creditor. Rather, the statute requires examination of the particular payments at issue and whether they were specifically for an antecedent debt. Hence, even if CSX's original claims under the policy can be considered antecedent debt, the payments here were not for that debt but rather for the new Agreement wherein CSX released future claims.

payment, gave the debtor freedom from the risk of litigation and an increase in the value of his property when the lis pendens was lifted. See id. Thus, there was no antecedent debt from which it sprung, but rather, the old debt was cancelled and the settlement agreement formed a new debt which was satisfied by the payment. See id. Similarly here, the original claims under the policy were canceled via the Agreement and the Agreement gave rise to new debts the payment of which do not constitute preferences.[19] See also In re Anthony Sicari, Inc., 144 B.R. 656, 662 (Bankr. S.D.N.Y. 1992) (holding payment was not a preference because it was "not payment on an antecedent debt, but in settlement of pending litigation").

This principle is underscored by viewing statutes of limitation. When a party brings suit on a claim but then enters into a settlement agreement, dismissing his suit with prejudice, another subsequent suit for breach of that settlement agreement is not barred simply because the original limitation period has ended. Rather, because that person would have a new action under the settlement agreement for its breach by failure to pay the debt created by the settlement agreement, the person may chose either to rescind the agreement (provided the limitations period has not run and he can still sue on the original claim) or he may sue under the new agreement within its new limitations period. See Butcher v. Gilroy, 744 P.2d 311, 312-13 (Utah Ct. App. 1987)

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[19]The Liquidator correctly notes "'that a debt is incurred when a debtor first becomes legally obligated to pay . . . .'" (Appellant's Br. at 20 n.5 (quoting In re White River Corp., 799 F.2d 631, 632 (10th Cir. 1986)).) Because SAIC could not have been obligated to pay claims for CSX's losses on then-unknown potential cases, such obligations did not exist before the Agreement and thus cannot be considered antecedent.

(holding that action for breach of settlement agreement accrued at time the terms of the agreement were breached).

Accordingly, it is clear that the debts for which SAIC made the payments were newly incurred through the Agreement when they came due under the Agreement. The payments, therefore, were not for antecedent debts and thus cannot be avoided by the trustee. Consequently, on this independent ground, this Court should affirm the grant of summary judgment for CSX.

III. THIS COURT SHOULD NOT REMAND FOR ENTRY OF SUMMARY JUDGMENT FOR THE LIQUIDATOR.

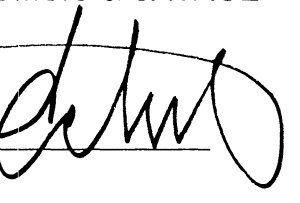
The Liquidator erroneously asserts that acceptance of his arguments requires remand for entry of summary judgment in his favor. (Appellant's brief at 10.) As explained above, however, even if this Court determines the trial court erred with respect to the new and contemporaneous consideration defense, this Court should still affirm summary judgment on the additional grounds raised by CSX below. In the event, however, this Court also rejects those grounds, the case should be remanded without direction to enter summary judgment in the Liquidator's favor so that the trial court may address the issues not previously reached. Indeed, the denial of the Liquidator's motion alone would not be a final order within the purview of this Court's appellate jurisdiction. See Denison v. Crown Toyota Motors, Inc., 571 P.2d 1359, 1360 (Utah 1977); R.F. Chase, Annotation, Reviewability of Order Denying Motion for Summary Judgment, 15 A.L.R. 3d 899, at 902-03 (1967 & Supp. 2001) (and authority cited therein) ("The vast majority of cases that have ruled upon the question whether an order denying a motion for summary judgment is reviewable by appeal or writ of error have held against such review.").

CONCLUSION

This Court should affirm the grant of summary judgment for CSX. First, the trial court correctly ruled that the Agreement provided new and contemporaneous consideration as a matter of law and that this forecloses the Liquidator's ability to avoid the payments. Further, this Court should affirm upon the alternate grounds raised below. That is, summary judgment was proper because the payments were received for debts incurred in the ordinary course of business within forty-five days of being incurred and according to normal business terms. Further, the payments were for debts arising via the Agreement that were incurred as each payment became due, and thus were not transfers pursuant to an antecedent debt and are not preferences within the scope of the statute.

DATED this 24th day of December, 2001.

BERMAN, GAUFIN, TOMSIC & SAVAGE

By 

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the within and foregoing BRIEF OF THE APPELLEE and the ADDENDUM TO BRIEF OF THE APPELLEE, filed concurrently herewith, to be hand delivered this 24th day of December, 2001, to the following:

Douglas M. Monson
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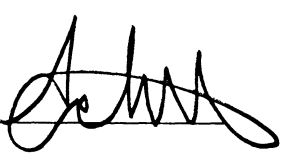
DATED this 24th day of December, 2001.

BERMAN, GAUFIN, TOMSIC & SAVAGE

By 

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ADDENDUM

TABLE OF CONTENTS

Exhibit #:	Description
1.	Utah Code Ann. § 31A-27-102 (Supp. 2001)
2.	Utah Code Ann. § 31A-27-321 (1999)
3.	Utah Code Ann. § 31A-27-411 (1999)
4.	11 U.S.C.A. § 547 (West 1993)
5.	March 1, 1991 Letter
6.	May 20, 1991 Letter
7.	June 22, 1991 Letter
8.	July 16, 1991 Letter
9.	August 8, 1991 Letter
10.	August 16, 1991 Letter
11.	August 26, 1991 Letter
12.	November 6, 1991 Letter
13.	Insurance Policy

Tab 1

History: C. 1953, 31A-26-302, enacted by L. 1985, ch. 242, § 31; 2001, ch. 116, § 174.

Amendment Notes. — The 2001 amendment, effective April 30, 2001, made a stylistic change in Subsection (3).

31A-26-303. Unfair claim settlement practices.

NOTES TO DECISIONS

Construction and application.

This section and the rules promulgated under it do not give rise to a private cause of action. Cannon v. Travelers Indem. Co., 2000 UT App 10, 994 P.2d 824, cert. denied, 4 P.3d 1289 (Utah 2000).

CHAPTER 27

INSURERS REHABILITATION AND LIQUIDATION

Part I

General Provisions

Section
31A-27-102. Definitions.
31A-27-104. Injunctions and orders.
31A-27-110. Immunity and indemnification of the receiver.

Part III

Formal Proceedings

31A-27-307. Grounds for liquidation.
31A-27-310. Liquidation orders.
31A-27-311.5. Continuance of coverage — Health maintenance organizations.
31A-27-323. Setoffs.
31A-27-328. Filing of claims.
31A-27-332. Disputed claims.
31A-27-335. Priority of distribution.

PART I

GENERAL PROVISIONS

31A-27-101. Scope, purpose, and construction.

NOTES TO DECISIONS

Cited in Davister Corp. v. United Republic Life Ins. Co., 152 F.3d 1277 (10th Cir. 1998), cert. denied, 525 U.S. 1177, 119 S. Ct. 1112, 143 L. Ed. 2d 108 (1999).

31A-27-102. Definitions.

(1) As used in this chapter:

(a) "Alien insurer domiciled in Utah" means an insurer domiciled outside the United States whose entry into the United States is through Utah.

(b) "Ancillary state" means any state other than an insurer's state of domicile.

(c) "Contingent claims" means a claim or demand upon which:

(i) a right of action has accrued at the date of the order of liquidation; and

(ii) liability has not been determined.

(d) "Date of liquidation" means the date of the filing of a petition for liquidation that results in an order for liquidation.

(e) "Delinquency proceeding" means any:

(i) proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving the insurer; and

(ii) summary proceeding under Sections 31A-27-201 through 31A-27-203.

(f) "Domestic insurer" includes, for purposes of this chapter, foreign insurers commercially domiciled in this state under Section 31A-14-206.

(g) (i) "Estate" or "property of the estate" means:

(A) all legal or equitable interests of an insurer that are the subject of a rehabilitation, liquidation, conservation, or other proceeding under this chapter in property as of the date of filing of the petition for rehabilitation, liquidation, or conservation;

(B) any interest in property recoverable by the receiver under the provisions of this title;

(C) any interest in property acquired after the date of filing of the petition; and

(D) all proceeds, products, rents, and profits from this property.

(ii) "Estate" or "property of the estate" includes property in which the insurer holds only legal title, but no equitable interest, only to the extent of the insolvent insurer's interest.

(h) "Fair consideration" is given for property or an obligation:

(i) when in exchange for the property or obligation, as a fair equivalent for it, and in good faith:

(A) property is conveyed;

(B) services are rendered;

(C) an obligation is incurred; or

(D) an antecedent debt is satisfied; or

(ii) when the property or obligation is received in good faith to secure a present advance or an antecedent debt in amount not disproportionately small compared to the value of the property or obligation obtained.

(i) (i) "General assets" means all property not encumbered by a security agreement for the security or benefit of specified persons or classes of persons.

(ii) "General assets" does not include separate account assets under Section 31A-5-217.

(iii) For encumbered property, "general assets" includes all that property or its proceeds which is in excess of the amount necessary to discharge the sums secured by the property.

(iv) Assets held in trust or on deposit for the security or benefit of all policyholders, or all policyholders and creditors, in more than a single state, are general assets.

(j) "Guaranty association" means:

(i) the applicable association under Chapter 28; or

(ii) the similar association under the laws of another state.

(k) "Immature claim" means a claim or demand upon which payment is due, except for the passage of time.

(l) "Insolvency" has the same meaning as in Section 31A-1-301.

(m) "Insurer" means any person who is doing, has done, purports to do, or is licensed to do an insurance business on its own account and is or has

been subject to the authority of, or to liquidation, rehabilitation, reorganization, or supervision by, a commissioner. A separate account created under Section 31A-5-217 is an "insurer" for purposes of Chapter 27.

(n) "Preferred claim" means any claim that the law gives priority of payment from the general assets of the insurer.

(o) "Receiver" means receiver, liquidator, rehabilitator, or conservator, as the context requires.

(p) "Reciprocal state" means any state other than this state:

(i) in which in substance Subsection 31A-27-310(1), Subsections 31A-27-403(1) and (3), Sections 31A-27-404 and 31A-27-406 through 31A-27-409 are in force;

(ii) which has laws requiring the commissioner to be the receiver of a delinquent insurer; and

(iii) which has laws for the avoidance of fraudulent conveyances and preferential transfers by the receiver of a delinquent insurer.

(q) "Secured claim" means any claim secured by mortgage, trust deed, security agreement, pledge, deposit as security, escrow or otherwise, but not including special deposit claims. The term also includes claims that have become liens upon specific assets through judicial processes.

(r) "Separate account assets" means those assets allocated to separate accounts under Section 31A-5-217.

(s) "Special deposit claim" means any claim secured by a deposit in trust made pursuant to this title for the security or benefit of one or more limited classes of persons.

(t) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntarily or involuntarily, by or without judicial proceedings, of disposing of or parting with property or with an interest in property. The retention of a security interest in or title to property delivered to a debtor is considered a transfer by the debtor.

(u) "Unliquidated claim" means a claim or demand upon which:

(i) a right of action has accrued at the date of the order of liquidation; and

(ii) liability has been established but the amount of which has not been determined.

(2) If the subject of a rehabilitation or liquidation proceeding under this chapter is an insurer engaged in a surety business, then as used in this chapter:

(a) "Policy" includes a bond issued by a surety.

(b) "Policyholder" includes a principal on a bond.

(c) "Beneficiary" includes an obligee of a bond.

(d) "Insured" includes both the principal and obligee of a bond.

History: C. 1953, 31A-27-102, enacted by L. 1985, ch. 242, § 32; 1986, ch. 204, § 222; 1996 (2nd S.S.), ch. 9, § 55; 1999, ch. 131, § 26.

Amendment Notes. — The 1999 amendment, effective May 3, 1999, substituted "Section 31A-1-301" for "Subsection 31A-1-301(39)" in Subsection (1)(l), designated subsections, and made stylistic changes.

31A-27-104. Injunctions and orders.

(1) Any receiver appointed in a proceeding under this chapter may, at any time, apply for and any court of general jurisdiction in this state may grant, under the relevant provisions of the Utah Rules of Civil Procedure, any

Tab 2

purposes of Subsection (2) if the lien or purchase superiority can be obtained only through acts subsequent to the obtaining of the lien or subsequent to the purchase which require the agreement or concurrence of any third party or which require any further judicial action or ruling.

(4) Any transaction of the insurer with a reinsurer is considered fraudulent and may be avoided by the rehabilitator or liquidator under Subsection (1) if:

(a) the transaction consists of the termination, adjustment, or settlement of a reinsurance contract in which the reinsurer is released from any part of its duty to pay the originally specified share of losses that had occurred prior to the time of the transaction, unless the reinsurer gives a present fair consideration for the release; and

(b) any part of the transaction took place within one year prior to the date of filing of the petition pursuant to which the rehabilitation or liquidation was commenced.

(5) An action or proceeding under this section may not be commenced after the earlier of:

(a) two years after the appointment of a rehabilitator under Section 31A-27-303 or a liquidator under Section 31A-27-310; or

(b) the date the rehabilitation is terminated under Subsection 31A-27-306(2) or the liquidation is terminated under Section 31A-27-339.

History: C. 1953, 31A-27-320, enacted by L. 1985, ch. 242, § 32; 1986, ch. 204, § 238.

Cross-References. — Uniform Fraudulent Transfer Act, Title 25, Chapter 6.

COLLATERAL REFERENCES

A.L.R. — Right of secured creditor to have set aside fraudulent transfer of other property by his debtor, 8 A.L.R.4th 1123.

31A-27-321. Voidable preferences and liens.

(1) (a) As used in this chapter, "preference" means a transfer of any of the property of an insurer to or for the benefit of a creditor, for or on account of an antecedent debt, made or allowed by the insurer within one year before the filing of a successful petition for rehabilitation or liquidation under this chapter, the effect of which transfer may enable the creditor to obtain a greater percentage of his debt than another creditor of the same class would receive. If a liquidation order is entered while the insurer is already subject to a rehabilitation order, transfers otherwise qualifying are considered to be preferences if they are made or allowed within one year before the filing of the successful petition for rehabilitation or within two years before the filing of the successful petition for liquidation, whichever time is shorter.

(b) Any preference may be avoided by the rehabilitator or liquidator, if:

(i) the insurer was insolvent at the time of the transfer;

(ii) the transfer was made within four months before the filing of the petition;

(iii) the creditor receiving it or to be benefited by it or his agent acting with reference to the transfer had, at the time when the transfer was made, reasonable cause to believe that the insurer was or was about to become insolvent; or

(iv) the creditor receiving it was an officer, an employee, an attorney, or other person who was in fact in a position of comparable influence in the insurer to an officer, or any shareholder holding directly or indirectly more than 5% of any class of equity security issued by the insurer, or any other person with whom the insurer did not deal at arm's length.

(c) Where the preference is voidable, the rehabilitator or liquidator may recover the property or, if it has been converted, its value, from any person who has received or converted the property, except that he may not recover from a bona fide purchaser from or lienor of the debtor's transferee for a present fair consideration. Where a bona fide purchaser or lienor has given less than fair consideration, the bona fide purchaser or lienor has a lien upon the property to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may, on due notice, order the lien or title to be preserved for the benefit of the estate, in which event the lien or title passes to the liquidator.

(d) Any payment to which Subsection 31A-5-415(2) applies is a preference and is voidable under Subsection (1)(b) if it is made within the time period specified in Subsection (1)(a), except that payments made by insurers for the purchase of insurance under Section 16-10a-302 are not preferences.

(2) Subsection 31A-27-320(2) applies to the perfection of transfers.

(3) Subsection 31A-27-320(3) applies to liens by legal or equitable proceedings.

(4) The receiver may not avoid a transfer of property under this section for or because of:

(a) a new and contemporaneous consideration;

(b) the payment, within 45 days after a debt is incurred, of a debt incurred in the ordinary course of the business of the insurer and according to normal business terms;

(c) a transfer of a security interest in property to enable the insurer to acquire the property and which is perfected within ten days after the security interest attaches;

(d) a transfer to or for the benefit of a creditor to the extent that after the transfer, the creditor gave new value not secured by an unavoidable security interest and on account of which the insurer did not make an unavoidable transfer to or for the benefit of the creditor; or

(e) a transfer of a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all of those types of transfers to the transferee caused a reduction of the amount by which the debt secured by the security interest exceeded the value of the security interest four months prior to the date of liquidation or any time subsequent to the liquidation.

(5) The receiver may avoid a transfer of property of the insurer transferred to secure reimbursement of a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the receiver under Subsection (1)(b). The liability of the surety under the bond or obligation shall be discharged to the extent of the value of the property recovered by the receiver or the amounts paid to the receiver.

(6) The property affected by any lien which is considered voidable under Subsection (1)(b) and Subsection (5) is discharged from the lien, and that

property and any of the indemnifying property transferred to or for the benefit of a surety passes to the rehabilitator or liquidator, except that the court may, on due notice, order the lien to be preserved for the benefit of the estate and the court may direct that a conveyance be executed which is adequate to evidence the title of the rehabilitator or liquidator.

(7) The court has jurisdiction of any proceeding by the rehabilitator or liquidator, to hear and determine the rights of any parties under this section. Reasonable notice of any hearing in the proceeding shall be given to all parties in interest, including the obligee of a releasing bond or other similar obligation. Where an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court, upon application of any party in interest, shall in the same proceeding ascertain the value of the property or lien, and if the value is less than the amount for which the property is indemnity or than the amount of the lien, the transferee or lienholder may elect to retain the property or lien upon payment of its value, as ascertained by the court, to the rehabilitator or liquidator within those reasonable times as fixed by the court.

(8) The liability of a surety under a releasing bond or other similar obligation is discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and avoided or, where the property is retained under Subsection (7) to the extent of the amount paid to the rehabilitator or liquidator.

(9) If a creditor has been preferred and afterward in good faith gives the insurer further credit without security of any kind, for property which becomes a part of the insurer's estate, the amount of the new credit remaining unpaid at the time of the petition shall be setoff against the preference which would otherwise be recoverable from him.

(10) If an insurer, directly or indirectly, within four months before the filing of a successful petition for rehabilitation or liquidation under this chapter or at any time in contemplation of a proceeding to rehabilitate or liquidate it, pays money or transfers property to an attorney at law for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the rehabilitator or liquidator and shall be held valid only to the extent the transfer is a reasonable amount as determined by the court. The excess may be recovered by the rehabilitator or liquidator for the benefit of the estate. If the attorney meets the description in Subsection (1)(b)(iv), that subsection applies in place of this subsection.

(11) (a) Every officer, manager, employee, shareholder, member, subscriber, attorney, or any other person acting on behalf of the insurer who knowingly participates in giving any preference when he has reasonable cause to believe the insurer is or is about to become insolvent at the time of the preference, is personally liable to the rehabilitator or liquidator for the amount of the preference. It is permissible to infer that there is reasonable cause to so believe if the transfer was made within four months before the date of filing the successful petition for rehabilitation or liquidation.

(b) Every person receiving any property from the insurer or for the benefit of the insurer as a preference which is voidable under Subsection (1)(b) is personally liable for that transfer and property and is bound to account to the rehabilitator or liquidator.

(c) This subsection does not prejudice any other claim by the rehabilitator or liquidator against any person.

History: C. 1953, 31A-27-321, enacted by L. 1985, ch. 242, § 32; 1986, ch. 204, § 239; *1987, ch. 166, § 9; 1992, ch. 277, § 240.*

31A-27-322. Recoupment from affiliates.

(1) If an order for the liquidation, rehabilitation, or conservation of an insurer authorized to do business in this state is ordered under this chapter, the receiver appointed under the order has a right to recover on behalf of the insurer from any affiliate that controlled the insurer the amount of distributions, other than stock dividends paid by the insurer on its capital stock, made at any time during the five years preceding the petition for liquidation, rehabilitation, or conservation. This recovery is subject to the limitations of Subsections (2) through (6).

(2) No dividend is recoverable if the recipient shows that, when paid, the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect its solvency.

(3) The maximum amount recoverable under this section is the amount needed, in excess of all other available assets, to pay all claims under the receivership, reduced for each recipient by any amount the recipient has already paid to receivers under similar laws of other states.

(4) Any person who was an affiliate that controlled the insurer at the time the distributions were paid is liable up to the amount of distributions he received. Any person who was an affiliate that controlled the insurer at the time the distributions were declared is liable up to the amount of distributions he would have received if they had been paid immediately. If two or more persons are liable regarding the same distributions, they are jointly and severally liable.

(5) If any person liable under Subsection (4) is insolvent, all affiliates that controlled that person at the time the dividend was declared or paid are jointly and severally liable for any resulting deficiency in the amount recovered from the insolvent affiliate.

(6) This section does not enlarge the personal liability of a director under existing law.

(7) An action or proceeding under this section may not be commenced after the earlier of:

(a) two years after the appointment of a rehabilitator under Section 31A-27-303 or a liquidator under Section 31A-27-310; or

(b) the date the rehabilitation is terminated under Subsection 31A-27-306(2) or the liquidation is terminated under Section 31A-27-339.

History: C. 1953, 31A-27-322, enacted by L. 1986, ch. 204, § 240.

Repeals and Reenactments. — Laws 1986, ch 204, § 240 repealed former § 31A-27-322, as enacted by Laws 1985, ch 242, § 32, relating to recovery from affiliates of excessive contributions, and enacted present § 31A-27-322, effective July 1, 1986.

31A-27-323. Setoffs.

(1) Mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this chapter shall be set off and only the balance shall be allowed or paid, except as provided in Subsection (2).

Tab 3

creation and maintenance of the deposits. If there is a deficiency in any deposit so that the claims secured by it are not fully discharged from it, the claimants may claim against a guaranty fund or association or may share in the general assets, but the claim shall be limited and the sharing shall be deferred until the general creditors having the same priority, and also the claimants against other special deposits sharing the same priority who have received smaller percentages from their respective special deposits, have been paid percentages of their claims equal to the percentage paid from the special deposit.

(3) The owner of a secured claim against an insurer for which a liquidator has been appointed in this state or any other state may surrender the security for the claim and file the claim as a general creditor, or the claim may be discharged by resort to the security in accordance with Section 31A-27-334, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors.

History: C. 1953, 31A-27-409, enacted by L. 1985, ch. 242, § 32; 1986, ch. 204, § 249.

31A-27-410. Subordination of claims for noncooperation.

If an ancillary receiver in another state or foreign country, whether called an ancillary receiver or not, fails to transfer to the domiciliary liquidator in Utah any assets within his control other than special deposits, diminished only by the expenses of the ancillary receivership, if any, then the claims filed in the ancillary receivership, or with the guaranty fund or association in that jurisdiction, other than special deposit claims or secured claims, shall be placed in the class six of claims under Section 31A-27-335.

History: C. 1953, 31A-27-410, enacted by L. 1985, ch. 242, § 32; 1995, ch. 344, § 38.

31A-27-411. Severability clause.

If any provision of this chapter or its application to any person or circumstance is found to be unconstitutional, or in conflict with or superseded by the federal Bankruptcy Reform Act of 1978, 11 U.S.C. Section 101 et seq., as amended, the remainder of the chapter and the application of the provision to other persons or circumstances shall not be affected by it.

History: C. 1953, 31A-27-411, enacted by L. 1985, ch. 242, § 32; 1986, ch. 204, § 250.

CHAPTER 28
GUARANTY ASSOCIATIONS

Part I

Utah Life and Disability Insurance Guaranty Association Act

Section
31A-28-101. Short title.
31A-28-102. Purpose.
31A-28-103. Coverage and limitations.
31A-28-104. Construction.
31A-28-105. Definitions.
31A-28-106. Continuation of the association — Association duties — Allocation of assessments.

Tab 4

178. Commencement of case

Bankruptcy section limiting avoidance powers with respect to settlement payments made before commencement of case did not apply to trustee's action to recover transferred certificates of deposits or their proceeds, where transfer had occurred after SEC filed action against brokerage pursuant to which receiver was appointed, date which court had held to be date of commencement of case. Matter of Bevill, Bresler & Schulman, Inc., D.N.J.1988, 83 B.R. 880.

§ 547. Preferences

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest

exceeded the value of all security interests for such debt on the later of—

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(Pub.L. 95–598, Nov. 6, 1978, 92 Stat. 2597; Pub.L. 98–353, Title III, §§ 310, 462, July 10, 1984, 98 Stat. 355, 377; Pub.L. 99–554, Title II, § 283(m), Oct. 27, 1986, 100 Stat. 3117.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1978 Acts. This section is a substantial modification of present law. It modernizes the preference provisions and brings them more into conformity with commercial practice and the Uniform Commercial Code.

Subsection (a) contains three definitions. Inventory, new value, and receivable are defined in their ordinary senses, but are defined to avoid any confusion or uncertainty surrounding the terms.

Subsection (b) is the operative provision of the section. It authorizes the trustee to avoid a transfer if five conditions are met. These are the five elements of a preference action. First, the transfer must be to or for the benefit of a creditor. Second, the transfer must be for or on account of an antecedent debt owed by the debtor before the transfer was made. Third, the transfer must have been made when the debtor was insolvent. Fourth, the transfer must have been made during the 90 days immediately preceding the commencement of the case. If the transfer was to an insider, the trustee may avoid the transfer if it was made during the period that begins one year before the filing of the petition and ends 90 days before the filing, if the insider to whom the transfer was made had reasonable cause to believe the debtor was insolvent at the time the transfer was made.

Finally, the transfer must enable the creditor to whom or for whose benefit it was made to receive a greater percentage of his claim than he would receive under the distributive provisions of the bankruptcy code. Specifically, the creditor must receive more than he would if the case were a liquidation case, if the transfer had not been made, and if the creditor received payment of the debt to the extent provided by the provisions of the code.

The phrasing of the final element changes the application of the greater percentage test from that employed under current law. Under this language, the court must focus on the relative distribution between classes as well as the amount that will be received by the members of the class of which the creditor is a member. The language also requires the court to focus on the allowability of the claim for which the preference was made. If the claim would have been entirely disallowed, for example, then the test of paragraph (5) will be met, because the creditor would have received nothing under the distributive provisions of the bankruptcy code.

The trustee may avoid a transfer of a lien under this section even if the lien

Tab 5

Casey, Scott, Canfield & Hoggestad, P. C.
Attorneys at Law

The Southern Building
805 15th Street, N. W. Suite 600
Washington, D. C. 20005
(202) 682-4082

March 1, 1991

Sherry W. Gilbert, Esq.
Anderson, Kill, Olick & Oshinsky
2000 Pennsylvania Avenue, NW
Suite 7500
Washington, D.C. 20006

Re: CSX Asbestos Coverage Litigation

Dear Sherry:

We have reviewed the allocations which you provided us in December. The two most recent allocations indicate that our prior estimates for Southern's potential liability were underestimated. This has caused us to reconsider our settlement position. However, in the interests of resolving this dispute quickly and economically, we are making a settlement offer based on the following considerations.

The part of the settlement agreement which causes us the most concern is CSX's contribution to the asbestos losses. Based on our current projections, CSX will pay approximately $30 million in asbestos losses. However, the self-insured retentions under all the policies issued to CSX and its predecessor entities total well over $60 million. Thus, $30 million, in asbestos losses, will be allocated to the insurers which should be allocated to CSX.

Another problem with the settlement agreement is the very high settlement authority given to CSX. Based on the statistics that we have seen so far, the average litigated claim has settled for $58,000. However, the settlement agreement provides for a $150,000/claim settlement authority. In effect, this means that no settlement will be reviewed by the Claims Handling Agent. Our concern over this provision in the settlement agreement is heightened by the fact that a disproportionately large amount of the claims have been settled over the last two years. During these same two years, CSX's contribution to the asbestos losses has been limited to 10% of the total losses. Our concern is not limited to the settlement amounts over the last two years but also includes the fear that settlements will again be disproportionately greater in the last

few years of the settlement agreement. The very high settlement authority increases the chance that insurers will have to pay for claims which would not otherwise have come under the settlement agreement.

Our current estimate for total asbestos losses is $130 million. Of that amount we expect $100 million to be allocated to the insurers. Based on prior allocations, we expect Southern's portion of this amount to be .16% or, $160,000. Although the settlement agreement provides for the payment of this amount over time, given that this is a relatively small amount and that it would be costly to Southern to pay its obligations in small amounts every year, we propose that Southern pay a lump sum which is discounted to reflect the time value of money. We, therefore, propose to settle the claims arising out of the asbestos action for $100,000. This amount also includes a reduction to account for the disproportionate allocation to the insurers of the asbestos losses.

If you would like to discuss this proposal, I am available to meet at your convenience.

Sincerely,

Robert E. Heggestad

INTEREST ?

NOT FACTORED IN ATTYS FEES

REH/pdh

Tab [redacted]6

ANDERSON KILL OLICK & OSHINSKY
SUITE 7500
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SHERRY WARD GILBERT
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PHILADELPHIA PA 19103
(215) 568 4202

May 20, 1991

CONFIDENTIAL SETTLEMENT COMMUNICATION

Robert E. Heggestad, Esquire
Casey, Scott, Canfield & Heggestad, P.C.
The Southern Building
805 15th Street, N.W.
Suite 600
Washington, D.C. 20005

Re: CSXT - Asbestos Coverage Litigation

Dear Bob:

CSX Transportation, Inc. ("CSXT") has considered Southern American's settlement proposal set forth in your March 1, 1991 letter to me and has the following response.

Southern American's concerns with CSXT's coverage-in-place settlement arrangement are unfounded. As I am certain you can appreciate, CSXT and the settling insurers differed on a number of issues and the settlement represents an overall compromise. Thus, focusing on specific issues in isolation can create an inaccurate perspective. However, Southern American's concerns warrant comment, even when viewed out of the context of the complete agreement.

First, CSXT views its contribution to asbestos losses as more than adequate. Of the more than $98 million paid in asbestos losses to date, CSXT's contribution (excluding the amounts allocable under the agreement to non-settling insurers) has been approximately $22 million.[1] This amount is comprised of the initial $10 million in losses absorbed by CSXT under the agreement, CSXT's 10% to 20% share of the losses, and CSXT's

[1] Under certain constructions of the policy language, CSXT's contribution would have been limited to a mere fraction of that amount.

responsibility for the amounts that otherwise would be allocated to insolvent insurers. Currently, the insolvent insurers' shares represent approximately 4% of the first-layer coverage.

Second, the settlement authority has not presented a problem for the settling insurers. CSXT has consulted with the Claims Handling Agent concerning settlement on numerous occasions and CSXT is confident that the settling insurers would confirm that CSXT has not abused its settlement authority.

Thus, CSXT's offer to Southern American to sign onto the existing coverage-in-place settlement stands. If Southern American should decide to do so, its allocations through the Seventh Billing (through 9/30/90) total approximately $109,000. A copy of the Seventh Billing is enclosed for your information.

If Southern American prefers a lump-sum settlement, CSXT is willing to entertain that approach. However, any such settlement must be based upon a more realistic amount than the $100,000 that Southern American has offered. According to CSXT's estimates for total asbestos losses, Southern American's share under the existing agreement's allocation method would approximate $387,500.00. CSXT does not share Southern American's view that a discount is appropriate, particularly since no interest has been computed on the amounts due from Southern American for asbestos losses dating back to the early 1980's.

If you or your client would like to discuss either of these proposals further, please let me know.

Sincerely,

Sherry W. Gilbert

SWG:ks

bcc: R. Templeton Fitch
C. Keith Meiser

Bill No. F

CBX ASBESTOS SETTLEMENT
SUMMARY OF AMOUNTS
DUE FROM INSURERS
4/1/90 TO 9/30/90

Aetna	$1,258,246.71
All Star	14,843.02
American Home	98,243.48
American Reinsurance	466,097.01
Bellefonte	27,809.70
California Union	1,234,025.61
Casualty Insurance	1,854.74
Continental Casualty	81,518.77
Employers Surplus	409,698.18
Federal Ins.	32,544.98
First State	123,986.69
General Reinsurance	279,360.29
Glacier Ins.	40,847.53
Harbor	7,584,023.31
Home	87,946.79
HSW-El Paso	66,963.43
HSW-Kingscroft	123,462.32
HSW-Louisville	53,009.89
HSW-Mutual Re	62,342.83
HSW-Other	323,153.97
Imperio	4,389.09
International Re	23,261.03
Interstate	13,367.16
ISLIC	406,981.23
Lexington	321,107.65
Lloyd's & Cos.	4,756,529.09
Mentor	12,424.19
Midland	3,709.48
Mutual Fire	40,537.22
North River	245,422.71
Nationwide	121,353.86
Pacific (Harbor)	127,589.91
Seguros	6,027.91
Signal	2,013.93
Southern American	29,179.63
St. Helens	42,176.96
TMI	417,892.44
Wausau	591,324.83
Unknown	507,560.90
	$20,042,828.47

INSURER: SOUTHERN AMERICAN

Mendes and Mount
Reimbursable by Insurer
CSX Railroad

Policy	Year Reimbursable	
** Policy: XG860028	79	07/15/79-07/14/80
** Subtotal **		9595.46
** Policy: XG860092	80	07/15/80-07/31/81
** Subtotal **		10014.93
** Policy: XG860108	81	08/01/81-07/31/82
** Subtotal **		9569.24
*** Total ***		29179.63

Tab 7

Causey, Scott, Canfield & Heggestad, P. C.
Attorneys at Law

The Southern Building
805 15th Street, N. W., Suite 600
Washington, D. C. 20005
(202) 682-4082

ROBERT E. HEGGESTAD

June 22, 1991

Sherry W. Gilbert, Esq.
Anderson, Kill, Olick & Oshinsky
2000 Pennsylvania Avenue, NW
Suite 7500
Washington, D.C. 20006

Re: CSX Asbestos Coverage Litigation

Dear Sherry:

Southern American has authorized me to respond to your letter of May 20, 1991 regarding its previous proposal of a lump-sum settlement of $100,000. Your counter-offer, which does not reflect a present value discount, appears to be based on an estimate of the insurer's share of future asbestos losses of approximately $191,408,000. ?

It is our belief that the insurer's share of asbestos losses under the existing allocation formula will not exceed $100,000,000 during the remainder of the term of the agreement. Thus, we believe that Southern American's projected share, including the $109,000 allocated to date, should be approximately $254,500, not $387,500. Regardless of whether or not CSX has computed interest on back amounts, there is unquestionably a certain present value premium which attaches to any large lump sum payment received in advance of the remaining 9 years during which this sum would be paid out under the settlement agreement. Under these circumstances, Southern American is willing to offer CSX $210,000 as a lump sum settlement to dispose of this matter.

Please call me if you would like to discuss this matter in greater detail.

Sincerely,

Robert E. Heggestad

REH/ddd

cc: Mr. Max Levine
Southern American Insurance Company

000255

Tab 8

ANDERSON KILL OLICK & OSHINSKY
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(212) 850 0700

SUITE 1416
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PHILADELPHIA, PA 19103
(215) 568-4202

SHERRY WARD GILBERT
DIRECT DIAL (202) 728-3104

July 16, 1991

PRIVILEGED AND CONFIDENTIAL
SETTLEMENT COMMUNICATION

Robert E. Heggestad, Esquire
Casey, Scott, Canfield & Heggestad, P.C.
The Southern Building
805 15th Street, N.W.
Suite 600
Washington, D.C. 20005

Re: CSXT - Asbestos Coverage Litigation

Dear Bob:

CSXT has reviewed Southern American's recent settlement proposal as set forth in your June 22, 1991 letter to me.

Initially, CSXT does not understand the basis for Southern American's projection that its total share of asbestos losses during the term of the existing agreement with other insurers would amount to $254,500. If you can provide further support for this projection, perhaps it would be useful to CSXT's analysis.

However, CSXT remains willing to accept a lump-sum settlement based upon its own projections of Southern American's share under the settlement agreement. As you are aware, the allocations to Southern American under the settlement agreement, through September 1990 (Bill No. 7), total $108,736.41, and CSXT estimates that Southern American's future allocations would total $278,700 during the remainder of the term of the agreement. If those amounts are adjusted to account for interest accrued (from the date of billing) on past allocations and to account for the present value of future allocations, the total lump-sum payment acceptable to CSXT is $336,000.

I look forward to your response.

Sincerely,

Sherry W. Gilbert

Tab 9

Casey, Scott, Canfield & Heggestad, P. C.
Attorneys at Law

The Southern Building
805 15th Street, N. W. Suite 600
Washington, D. C. 20005
(202) 682-4082

August 8, 1991

Sherry W. Gilbert, Esq.
Anderson, Kill, Olick & Oshinsky
2000 Pennsylvania Avenue, NW
Suite 7500
Washington, D.C. 20006

Re: CSX Asbestos Coverage Litigation

Dear Sherry:

In our last conversation regarding settlement of this matter, you provided me with information regarding the basis for CSX's projection of future asbestos claims. Although this information was quite helpful, unfortunately it does not allow Southern to predict with any great amount of certainty what the total claims will amount to during the next ten years. To resolve this issue, I am authorized to propose a compromise offer of one lump sum payment of $308,000. Please call me if you would like to discuss this matter further.

Sincerely,

Robert E. Heggestad

REH/pdh

cc: Max Levine

000260

Tab 10

Casey, Scott, Canfield & Heggestad, P. C.
Attorneys at Law

The Southern Building
805 15th Street, N. W. Suite 600
Washington, D. C. 20005
(202) 682-4082

August 16, 1991

Sherry W. Gilbert, Esq.
Anderson, Kill, Olick & Oshinsky
2000 Pennsylvania Avenue, NW
Suite 7500
Washington, D.C. 20006

Re: CSX Asbestos Coverage Litigation

Dear Sherry:

In my August 8, 1991 letter to you, I proposed a lump sum payment of $308,000 to settle this matter on behalf of Southern American Insurance Company. This proposal is based on a payment schedule which would provide for the first 1/3 payment due on October 31, 1991, and the remaining 1/3 payments due on November 31, 1991 and December 31, 1991. Please call me if you would like to discuss either the amount or the payment schedule which Southern has proposed.

Sincerely,

Robert E. Heggestad

REH/pdh

cc: Max Levine

Tab 11

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August 26, 1991

PRIVILEGED AND CONFIDENTIAL
SETTLEMENT COMMUNICATION

Robert E. Heggestad, Esquire
Casey, Scott, Canfield & Heggestad, P.C.
The Southern Building
805 15th Street, N.W.
Suite 600
Washington, D.C. 20005

Re: CSXT - Asbestos Coverage Litigation

Dear Bob:

CSXT has asked me to convey to you that it is willing to accept Southern American's offer of $308,000 to settle CSXT's asbestos coverage litigation. CSXT understands that Southern American will make the payment in three installations due on October 31, November 30, and December 31, 1991, respectively. (I would suggest the first two payments be in the amount of $102,667 each and the last in the amount of $102,666.)

Please provide me, for CSXT's review, with Southern American's proposed settlement documents as soon as possible.

Sincerely,

Sherry

Sherry W. Gilbert

SWG:ks

Tab 12

Casey, Scott, Canfield & Heggestad, P. C.
Attorneys at Law

The Southern Building
505 15th Street, N. W. Suite 600
Washington, D. C. 20005
(202) 682-4082

ROBERT E. HEGGESTAD

November 6, 1991

VIA FACSIMILE

Sherry W. Gilbert, Esq.
Anderson, Kill, Olick & Oshinsky
2000 Pennsylvania Avenue, NW
Suite 7500
Washington, D.C. 20006

Re: CSX Asbestos Coverage Litigation

Dear Sherry:

Enclosed is the signed settlement letter recently forwarded to me from Southern American.

With best regards,

Sincerely,

Robert E. Heggestad

REH/pdh

Enclosure

ANDERSON KILL OLICK & OSHINSKY
SUITE 7500
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NEW YORK, N Y 10017
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SUITE 1416
1600 MARKET STREET
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(215) 568-4202

October 14, 1991

PRIVILEGED & CONFIDENTIAL
SETTLEMENT COMMUNICATION

Robert E. Heggestad, Esquire
Casey, Scott, Canfield & Heggestad, P.C.
The Southern Building
805 15th Street, N.W.
Suite 600
Washington, D.C. 20005

Re: Southern American/CSXT Asbestos Coverage Settlement

Dear Bob:

This will confirm the arrangements agreed to in connection with the asbestos-related settlement between Southern American Insurance Company ("Southern") and CSX Transportation, Inc. ("CSXT"). The arrangements that have been agreed to are:

Settlement Terms. Southern sold third-party liability insurance policies to one or more of CSXT's predecessor railroads. Subject to the modifications noted below, Southern agrees to join and participate in the Settlement Agreement executed by Certain Underwriters at Lloyd's, London and London Market Insurance Companies on September 16, 1988; by CSXT and its parent corporation CSX Corporation (collectively "CSX"), on September 19, 1988; and by Harbor Insurance Company on September 20, 1988 (the "Settlement Agreement"), which is incorporated herein by reference.

a. The DEFINITIONS Section of the Settlement Agreement is hereby amended to read as follows.

"Coverage Suits" means the actions titled The Chesapeake and Ohio Railway Company, et al. v. Certain Underwriters at Lloyd's, London, and London Market Insurance Companies, et al. and Western Maryland Railway Company v. Harbor Insurance Company, et al., Civil Action No. 85-3162 (D.D.C.) and No. 85-3163 (D.D.C.), filed in the United States District Court for the District of Columbia on October 3, 1985, and CSX

Transportation, Inc. v. Aetna Casualty & Surety Co., Civil Action No. 90-00015-R, filed in the United States District Court for the Eastern District of Virginia on January 11, 1990.

b. Exhibit A to the Settlement Agreement has been modified and a copy is attached hereto.

c. "Section I. PAYMENT PROVISIONS" is deleted in its entirety, and the following shall be substituted therefor:

Section I. PAYMENT PROVISIONS

In settlement of the Coverage Suits, the parties agree to the following payment provisions:

1. Southern will pay CSX the sum of $308,000.00 as follows:

$102,667.00 on October 31, 1991

$102,667.00 on November 30, 1991

$102,666.00 on December 31, 1991

This sum shall be in full satisfaction of any claim by CSX against the policies issued by Southern for any losses due to Asbestos-Related Claims, past, present, or future, whether or not asserted in the Coverage Suits.

2. Southern shall not be liable to pay CSX for losses due to Asbestos-Related Claims other than as set forth in this Agreement.

d. Effective Date. From and after the countersigning of this letter, the Settlement Agreement, as modified herein, shall be in full force and effect as between CSX and Southern and their respective obligations and undertakings shall be the same as if Southern had been an original settling "Insurer" as defined in the Settlement Agreement.

e. Notice. Any notice or correspondence to Southern regarding the Settlement Agreement shall be in writing addressed to:

Mr. Max Levine
Vice President/Claims
1450 East 300 North
Provo, Utah 84606

Please have the enclosed copy of this letter executed on behalf of Southern and return it to me at your earliest convenience.

Very truly yours,

Sherry W. Gilbert

Sherry W. Gilbert

ACKNOWLEDGED AND ADOPTED BY
CSX TRANSPORTATION, INC.

By: R A Beard

Its: Vice President Safety & Environmental

Dated: 10-17-91

ACKNOWLEDGED AND ADOPTED BY
SOUTHERN AMERICAN INSURANCE
COMPANY

By: Max Levine

Its: Vice President - Claims

Dated: 10-25-91

Tab 13

RENEWAL OF	REWRITE O.	PRODUCER	
135057		ALEXANDER & ALEXANDER	

PRODUCER'S %	PRODUCERS COMM.	NET DUE FROM PRODUCERS	BY		EXTRA COPIES 5 TO CPG
7½	$71,250.00	$878,750.00	JM/SG	8-14-79	COPIES TO

PREMIUM	CODE	AMOUNT	CO. CODE	S&C COMM. %	NET PAYABLE	AUDIT
			96			☐ A. ☐ S. ☐ Q. ☐ M. ☐ N MONTH DUE

BRANCH	PRODUCER	TRANS.	STATE		RENEWED BY	ELEVATORS INSPECTION ORDERED	

DECLARATIONS

INSURED NAME ADDRESS	CHESSIE SYSTEM, INC., ET AL (PER NAMED INSURED ENDORSEMENT) 2 NORTH CHARLES STREET BALTIMORE, MARYLAND 21201
TYPE OF COVERAGE	EXCESS LIABILITY
AMOUNT OR LIMITS	AS PER FORM
PERIOD OF INSURANCE	COMMENCING JULY 14, 1979 ENDING JULY 14, 1980 12 NOON STANDARD TIME AT THE ~~[redacted]~~ ABOVE ADDRESS OF THE INSURED

INFORMATION HERE ABBREVIATED. IN EVENT OF INCONSISTENCY WITH WORDINGS AND/OR ENDORSEMENTS ATTACHED HERETO. SAID WORDING AND/OR ENDORSEMENTS PREVAIL.

DEPOSIT PREMIUM	TOTAL
$950,000.00	$950,000.00

FORM(S) ATTACHED AT ISSUANCE: HU 8179, GU 8679A, END'S 1 THROUGH 15(MS).

INCLUDING TC/CC

HARBOR INSURANCE COMPANY

By _____ AUTHORIZED REPRESENTATIVE

DATED AT LOS ANGELES, CALIF. THIS 14TH DAY OF AUGUST, 1979

HU 8000-7 (REV. 1-74)

PRODUCER'S COPY

900331

HARBOR INSURANCE COMPANY
LOS ANGELES, CALIFORNIA

SECTION 1. DECLARATIONS

1.1 NAMED INSURED AND ADDRESS: CHESSIE SYSTEM, INC., ET AL (PER NAMED INSURED ENDORSEMENT)
2 NORTH CHARLES STREET, BALTIMORE, MARYLAND 21201

1.2 POLICY PERIOD: FROM JULY 14, 1979 TO JULY 14, 1980
(NOON XXXXXXXXX STANDARD TIME AT THE ABOVE ADDRESS OF THE NAMED INSURED)

1.3 PREMIUM:
RATE: $.55522 PER $1,000.00 REVENUE
DEPOSIT: $1,000,000.00
MINIMUM: $ 956,129.00

1.4 RETAINED LIMIT - PERSONAL INJURY AND PROPERTY DAMAGE: SEE ENDORSEMENT NO.2

1.5 OCCURRENCE LIMIT - PERSONAL INJURY AND PROPERTY DAMAGE: $8,000,000.00

1.6 AGGREGATE LIMIT - OCCUPATIONAL DISEASE: $8,000,000.00

1.7 THE INSURED REPRESENTS THAT IT HAS NOT PURCHASED OR HAD PURCHASED FOR ITS ACCOUNT INSURANCE AFFORDING PROTECTION AGAINST LIABILITY TO THE EXTENT OF "ULTIMATE NET LOSS" WITHIN THE RETAINED LIMIT AS EXPRESSED IN SECTION 1.4, EXCEPT FOR:
SEE ENDORSEMENT NO. 3

AND COVERAGE OF RAILROAD PROTECTIVE, SPECIAL TOURS AND SIMILAR TYPES OF COVERAGE AS WELL AS OTHER SPECIFIC INSURANCES NOT INVOLVING DIRECT RAILROAD OPERATING EXPOSURES AND AGREES TO GIVE THE HARBOR INSURANCE COMPANY 10 DAYS ADVANCE WRITTEN NOTICE OF ITS INTENTION TO PURCHASE OR TO HAVE PURCHASED FOR ITS ACCOUNT ANY OTHER SUCH INSURANCE.

ATTACHED TO AND FORMING A PART OF POLICY NO. 137030

ISSUED TO: CHESSIE SYSTEM, INC., ET AL

DATED: AUGUST 14, 1979

HARBOR INSURANCE COMPANY

BY _____
(AUTHORIZED REPRESENTATIVE)

(PROVISIONS ON PAGES 2, 3, 4, 5, 6, 7, 8, 9 AND 10 ARE HEREBY REFERRED TO AND MADE A PART HEREOF)
HU 8179 (1 0F 10) (ED. 8/78)

000382

EXCESS INDEMNITY RAILROAD OPERATIONS POLICY

HARBOR INSURANCE COMPANY
LOS ANGELES, CALIFORNIA

(A STOCK INSURANCE COMPANY, HEREIN CALLED THE COMPANY)

IN CONSIDERATION OF THE PAYMENT OF THE PREMIUM, IN RELIANCE UPON THE STATEMENTS IN SECTION 1. MADE A PART HEREOF AND SUBJECT TO ALL OF THE TERMS OF THIS POLICY, AGREES WITH THE INSURED NAMED IN SECTION 1.1 AS FOLLOWS:

SECTION 2. INSURING AGREEMENTS

2.1 COVERAGE. THE COMPANY WILL INDEMNIFY THE INSURED FOR ALL SUMS WHICH THE INSURED SHALL BECOME LEGALLY OBLIGATED TO PAY AS DAMAGES (ALL AS HEREINAFTER DEFINED AS INCLUDED WITHIN THE TERM "ULTIMATE NET LOSS") BECAUSE OF PERSONAL INJURY OR PROPERTY DAMAGE, CAUSED BY AN OCCURRENCE AND ARISING OUT OF OPERATIONS NECESSARY TO THE CONDUCT OF THE BUSINESS OF THE NAMED INSURED.

2.2 RETAINED LIMIT - OTHER INSURANCE. THE COMPANY SHALL BE LIABLE ONLY FOR THAT AMOUNT OF ULTIMATE NET LOSS RESULTING FROM ANY ONE OCCURRENCE WHICH IS IN EXCESS OF:

(A) THE AMOUNT STATED IN SECTION 1.4 AS "RETAINED LIMIT", OR

(B) THE AMOUNT OF THE APPLICABLE LIMIT OR LIMITS OF LIABILITY OF OTHER INSURANCE CARRIED BY THE INSURED OR ON ITS BEHALF, IF THE AMOUNT OF SUCH LIMIT OR LIMITS, OR THE AGGREGATE THEREOF, IS GREATER THAN THE AMOUNT STATED IN SECTION 1.4 AS THE "RETAINED LIMIT".

2.3 LIMITS OF LIABILITY. REGARDLESS OF THE NUMBER OF PERSONS OR ORGANIZATIONS WHO MAY CLAIM INDEMNITY UNDER THIS POLICY AS INSUREDS, THE COMPANY'S LIABILITY FOR ULTIMATE NET LOSS BECAUSE OF PERSONAL INJURY AND PROPERTY DAMAGE RESULTING FROM ANY ONE OCCURRENCE SHALL THEN BE LIMITED TO THE AMOUNT STATED IN SECTION 1.5 AS "OCCURRENCE LIMIT - PERSONAL INJURY AND PROPERTY DAMAGE"; PROVIDED, HOWEVER, THAT THE COMPANY'S LIABILITY SHALL BE FURTHER LIMITED TO THE AMOUNT STATED IN SECTION 1.6 WITH RESPECT TO ALL ULTIMATE NET LOSS BECAUSE OF PERSONAL INJURY WHICH OCCURS DURING EACH ANNUAL PERIOD WHILE THIS POLICY IS IN FORCE COMMENCING FROM ITS EFFECTIVE DATE, AND WHICH ARISES OUT OF OCCUPATIONAL DISEASES OF EMPLOYEES OF THE INSURED.

FOR THE PURPOSE OF DETERMINING THE LIMIT OF THE COMPANY'S LIABILITY, ALL PERSONAL INJURY AND PROPERTY DAMAGE ARISING

OUT OF CONTINUOUS OR REPEATED EXPOSURE TO SUBSTANTIALLY THE SAME GENERAL CONDITION EXISTING AT OR EMANATING FROM ONE LOCATION OR SOURCE SHALL BE CONSIDERED AS ARISING OUT OF ONE OCCURRENCE.

2.4 EXPENSES. THE COMPANY WILL INDEMNIFY THE INSURED FOR EXPENSES PAID OR INCURRED BY THE INSURED IN CONNECTION WITH PERSONAL INJURY OR PROPERTY DAMAGE ARISING OUT OF AN OCCURRENCE TO WHICH THIS POLICY APPLIES. SUCH EXPENSE IS PAYABLE IN ADDITION TO ANY LIMIT OF THE COMPANY'S LIABILITY FOR ULTIMATE NET LOSS, BUT THE COMPANY SHALL NOT BE OBLIGATED TO PAY ANY GREATER PROPORTION OF SUCH EXPENSE THAN THE AMOUNT OF ULTIMATE NET LOSS PAYABLE UNDER THIS POLICY BEARS TO THE TOTAL OF ALL ULTIMATE NET LOSS RESULTING FROM SUCH OCCURRENCE.

2.5 POLICY PERIOD: TERRITORY. THIS POLICY APPLIES ONLY TO OCCURRENCES DURING THE POLICY PERIOD AS STATED IN SECTION 1.2 AND

(1) WITHIN THE UNITED STATES OF AMERICA, ITS TERRITORIES OR POSSESSIONS, OR CANADA, OR

(2) ELSEWHERE THAN WITHIN THE TERRITORY DESCRIBED IN PARAGRAPH (1) ABOVE, PROVIDED THE ORIGINAL SUIT FOR DAMAGES AGAINST THE INSURED IS BROUGHT WITHIN SUCH TERRITORY.

SECTION 3. SEVERABILITY OF INTERESTS: DEFINITION OF INSURED

3.1 THE INSURANCE AFFORDED BY THIS POLICY APPLIES SEPARATELY TO EACH INSURED AGAINST WHOM CLAIM IS MADE OR SUIT IS BROUGHT, EXCEPT WITH RESPECT TO THE LIMITS OF THE COMPANY'S LIABILITY, AND THE INCLUSION HEREIN OF MORE THAN ONE INSURED SHALL NOT OPERATE TO INCREASE THE LIMITS OF THE COMPANY'S LIABILITY.

3.2 "INSURED" MEANS THE PERSON OR ORGANIZATION NAMED IN SECTION 1.1 AND ANY EXECUTIVE OFFICER, DIRECTOR OR STOCKHOLDER THEREOF WHILE ACTING WITHIN THE SCOPE OF HIS DUTIES AS SUCH.

"INSURED" SHALL ALSO INCLUDE:

(1) ANY SUBSIDIARY OF THE PERSON OR ORGANIZATION NAMED IN SECTION 1.1 ACQUIRED SUBSEQUENT TO THE EFFECTIVE DATE OF THIS POLICY AND COMING UNDER THE CONTROL AND ACTIVE MANAGEMENT OF THE PERSON OR ORGANIZATION NAMED IN SECTION 1.1, PROVIDED WRITTEN NOTICE OF THE ACQUISITION OF SUCH SUBSIDIARY IS GIVEN TO THE COMPANY WITHIN 30 DAYS THEREAFTER, OR

(2) ANY OTHER ORGANIZATION COMING UNDER THE CONTROL AND ACTIVE MANAGEMENT OF THE PERSON OR ORGANIZATION NAMED IN SECTION 1.1 SUBSEQUENT TO THE EFFECTIVE DATE OF THIS POLICY, PROVIDED WRITTEN NOTICE OF SUCH CONTROL AND ACTIVE MANAGEMENT OF SUCH ORGANIZATION IS GIVEN TO THE COMPANY WITHIN 30 DAYS THEREAFTER.

SUCH WRITTEN NOTICE SHALL ALSO STATE THE DATE ON WHICH THE INSURANCE FOR SUCH SUBSIDIARY OR OTHER ORGANIZATION IS TO COMMENCE WHICH DATE SHALL NOT BE PRIOR TO THE DATE SUCH SUBSIDIARY OR OTHER ORGANIZATION COMES UNDER THE CONTROL AND ACTIVE MANAGEMENT OF THE PERSON OR ORGANIZATION NAMED IN SECTION 1.1.

SECTION 4. OTHER DEFINITIONS

4.1 "AIRCRAFT" MEANS ANY HEAVIER THAN AIR OR LIGHTER THAN AIR AIRCRAFT DESIGNED TO TRANSPORT PERSONS OR PROPERTY.

4.2 "AUTOMOBILE" MEANS A LAND MOTOR VEHICLE, TRAILER OR SEMITRAILER, BUT DOES NOT INCLUDE ANY VEHICLES WHILE OPERATED ON RAILS.

4.3 "OCCURRENCE" MEANS AN ACCIDENT, INCLUDING CONTINUOUS OR REPEATED EXPOSURE TO CONDITIONS, WHICH RESULTS IN PERSONAL INJURY OR PROPERTY DAMAGE NEITHER EXPECTED NOR INTENDED FROM THE STANDPOINT OF THE INSURED.

4.4 "PERSONAL INJURY" MEANS BODILY INJURY, MENTAL ANGUISH, SHOCK, SICKNESS OR DISEASE, INCLUDING DEATH RESULTING THEREFROM; AND INJURY ARISING OUT OF FALSE ARREST, DETENTION OR IMPRISONMENT, MALICIOUS PROSECUTION, WRONGFUL ENTRY OR EVICTION, RACIAL OR RELIGIOUS DISCRIMINATION (EXCEPT WHERE INSURANCE FOR SUCH OCCURRENCE IS PROHIBITED BY LAW OR REGULATION), LIBEL, SLANDER, DEFAMATION OF CHARACTER OR INVASION OF PRIVACY.

4.5 "PROPERTY DAMAGE" MEANS INJURY TO OR DESTRUCTION OF TANGIBLE PROPERTY (OTHER THAN PROPERTY OWNED BY THE NAMED INSURED) AND ALL DIRECT AND CONSEQUENTIAL LOSS RESULTING THEREFROM

4.6 "ULTIMATE NET LOSS" MEANS THE TOTAL OF ALL DAMAGES, AS DEFINED BELOW, WITH RESPECT TO EACH OCCURRENCE:

"DAMAGES" MEANS ALL SUMS WHICH THE INSURED, OR ANY COMPANY AS ITS INSURER, OR BOTH, BECOME LEGALLY OBLIGATED TO PAY AS DAMAGES, WHETHER BY REASON OF ADJUDICATION OR

SETTLEMENT, BECAUSE OF PERSONAL INJURY OR PROPERTY DAMAGE TO WHICH THIS POLICY APPLIES. IN DETERMINING THE RETAINED LIMIT IN SECTION 2.2 FOREGOING, "DAMAGES" SHALL BE AS DEFINED HEREIN, LESS AMOUNTS REALIZED FROM THIRD-PARTY RECOVERIES AND THE NET VALUE OF SALVAGE;

PROVIDED "ULTIMATE NET LOSS" SHALL NOT INCLUDE EXPENSES AND SHALL NOT INCLUDE ANY DAMAGES BECAUSE OF LIABILITY EXCLUDED BY THIS POLICY.

4.7 "EXPENSES" MEANS INTEREST ACCRUING AFTER ENTRY OF JUDGMENT AND ALL REASONABLE EXPENSES (INCLUDING ATTORNEY'S FEES AND COURT COSTS) INCURRED BY THE INSURED IN THE INVESTIGATION, SETTLEMENT AND DEFENSE OF ANY CLAIM OR SUIT SEEKING SUCH DAMAGES AS DEFINED UNDER "ULTIMATE NET LOSS" AS A CONSEQUENCE OF ANY OCCURRENCE HEREUNDER (EXCLUDING, HOWEVER, ALL OFFICE EXPENSES OF THE INSURED, ALL SALARIES, WAGES AND EXPENSES FOR EMPLOYEES OF THE INSURED AND GENERAL RETAINER FEES FOR ATTORNEYS NORMALLY PAID BY THE INSURED).

SECTION 5. EXCLUSIONS

THIS POLICY DOES NOT APPLY:

5.1 TO PERSONAL INJURY OR PROPERTY DAMAGE FOR WHICH THE INSURED HAS ASSUMED LIABILITY UNDER ANY CONTRACT OR AGREEMENT, IF SUCH PERSONAL INJURY OR PROPERTY DAMAGE OCCURRED OR COMMENCED PRIOR TO THE TIME SUCH CONTRACT OR AGREEMENT BECAME EFFECTIVE;

5.2 TO ANY OBLIGATION FOR WHICH THE INSURED OR ANY CARRIER AS ITS INSURER MAY BE HELD LIABLE:

(1) UNDER ANY WORKERS' COMPENSATION LAW, OR ANY SIMILAR LAW, IF AT THE TIME OF THE OCCURRENCE GIVING RISE TO SUCH OBLIGATION THE INSURED IS NOT A QUALIFIED SELF-INSURER WITH RESPECT TO SUCH OBLIGATION, OR

(2) UNDER ANY UNEMPLOYMENT COMPENSATION OR DISABILITY BENEFITS LAW, OR ANY SIMILAR LAW;

5.3 EXCEPT WITH RESPECT TO PERSONAL INJURY TO EMPLOYEES OF THE INSURED ARISING OUT OF OR IN THE COURSE OF EMPLOYMENT BY THE INSURED, TO LIABILITY ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OPERATION, USE, LOADING OR UNLOADING OF:

(1) ANY AUTOMOBILE OWNED OR OPERATED BY OR RENTED OR LOANED TO THE INSURED, OR ANY OTHER AUTOMOBILE OPERATED BY ANY PERSON IN THE COURSE OF HIS EMPLOYMENT BY THE INSURED;

(2) ANY AIRCRAFT OWNED OR OPERATED BY OR RENTED OR LOANED TO THE INSURED, OR ANY OTHER AIRCRAFT OPERATED BY ANY PERSON IN THE COURSE OF HIS EMPLOYMENT BY THE INSURED;

(3) ANY WATERCRAFT, BUT THIS EXCLUSION SHALL NOT APPLY IF THE PERSONAL INJURY OR PROPERTY DAMAGE ARISES OUT OF THE LOADING OR UNLOADING OF ANY WATERCRAFT AT PREMISES OWNED BY, RENTED TO OR CONTROLLED BY THE INSURED PROVIDED SUCH WATERCRAFT IS NOT OWNED OR OPERATED BY OR IS NOT RENTED OR LOANED TO THE INSURED, OR IS NOT OPERATED BY ANY PERSON IN THE COURSE OF HIS EMPLOYMENT BY THE INSURED.

5.4 TO PROPERTY DAMAGE TO PROPERTY IN THE CARE, CUSTODY OR CONTROL OF THE INSURED OR PROPERTY AS TO WHICH THE INSURED IS FOR ANY PURPOSE EXERCISING PHYSICAL CONTROL.

SECTION 6. CONDITIONS

6.1 PREMIUM. THE DEPOSIT PREMIUM IN SECTION 1.3 IS AN ADVANCE PREMIUM ONLY. EARNED PREMIUM SHALL BE COMPUTED AT THE END OF EACH ANNUAL PERIOD FOR WHICH THE POLICY IS IN FORCE AT THE RATES APPLICABLE THERETO, PROVIDED THAT SUCH EARNED PREMIUM SHALL NOT BE LESS THAN THE MINIMUM PREMIUM STATED IN SECTION 1.3. APPROPRIATE ADDITIONAL PREMIUM SHALL BE PAYABLE WITH RESPECT TO ANY ADDITIONAL NAMED INSURED AND ANY SUBSIDIARY OR OTHER ORGANIZATION WHO BECOMES AN INSURED UNDER THE PROVISIONS OF SECTION 3.2.

"REVENUE" AS USED IN SECTION 1.3 SHALL MEAN THE TOTAL OF ALL FIGURES REPORTED AS TOTAL RAILWAY OPERATING REVENUES TO THE INTERSTATE COMMERCE COMMISSION UNDER THE UNIFORM SYSTEM OF ACCOUNTS OF THE INTERSTATE COMMERCE COMMISSION.

6.2 AUDIT. THE COMPANY SHALL BE PERMITTED TO EXAMINE AND AUDIT THE INSURED'S BOOKS AND RECORDS AT ANY TIME WHILE THIS POLICY IS IN FORCE AND WITHIN THREE YEARS AFTER THE FINAL TERMINATION OF THIS POLICY OR WITHIN ONE YEAR AFTER FINAL SETTLEMENT OF ALL CLAIMS ARISING OUT OF ANY OCCURRENCE DURING THE POLICY TERM.

6.3 NOTICE OF OCCURRENCE. WHENEVER IT APPEARS THAT AN OCCURRENCE MAY POSSIBLY INVOLVE CLAIMS IN THE AGGREGATE TOTALING MORE THAN 50% OF THE RETAINED LIMIT, WRITTEN NOTICE THEREOF SHALL BE GIVEN TO THE COMPANY OR ANY OF ITS AU-

THORIZED AGENTS AS SOON AS PRACTICABLE. SUCH NOTICE SHALL CONTAIN PARTICULARS SUFFICIENT TO IDENTIFY THE INSURED AND ALSO REASONABLY OBTAINABLE INFORMATION RESPECTING THE TIME, PLACE AND CIRCUMSTANCES OF THE OCCURRENCE, THE NAMES AND ADDRESSES OF THE INJURED AND OF AVAILABLE WITNESSES.

6.4 ASSISTANCE AND COOPERATION OF THE INSURED. THE INSURED SHALL BE RESPONSIBLE FOR THE SETTLEMENT OR DEFENSE OF ANY CLAIM MADE OR SUIT BROUGHT OR PROCEEDING INSTITUTED AGAINST THE INSURED WHICH NO OTHER INSURER IS OBLIGATED TO DEFEND THE INSURED SHALL USE DUE DILIGENCE AND PRUDENCE TO SETTLE ALL SUCH CLAIMS AND SUITS WHICH IN THE EXERCISE OF SOUND JUDGMENT SHOULD BE SETTLED, PROVIDED, HOWEVER, THAT THE INSURED SHALL MAKE NO SETTLEMENT FOR ANY SUM IN EXCESS OF THE RETAINED LIMIT WITHOUT THE APPROVAL OF THE COMPANY. WHEN IN THE JUDGMENT OF THE COMPANY AN OCCURRENCE MAY INVOLVE DAMAGES IN EXCESS OF THE RETAINED LIMIT OR THE LIMIT OF OTHER INSURANCE, THE COMPANY MAY ELECT AT ANY TIME TO PARTICIPATE WITH THE INSURED AND ANY OTHER INSURER IN THE INVESTIGATION, SETTLEMENT, AND DEFENSE OF ALL CLAIMS AND SUITS IN CONNECTION THEREWITH. THE INSURED WILL, AT THE REQUEST OF THE COMPANY, SUPPLY COPIES OF ANY INVESTIGATIVE REPORTS, MEDICAL REPORTS, OPINIONS AND CORRESPONDENCE OF DEFENSE COUNSEL AND ANY OTHER MATERIAL ACCUMULATED IN PREPARATION OF THE DEFENSE OF THE CLAIM OR SUIT

THE INSURED SHALL COOPERATE WITH THE OTHER INSURERS AS REQUIRED BY THE TERMS OF THE OTHER INSURANCE POLICIES AND COMPLY WITH ALL THE TERMS AND CONDITIONS THEREOF, AND SHALL ENFORCE ANY RIGHT OF CONTRIBUTION OR INDEMNITY AGAINST ANY PERSON OR ORGANIZATION WHO MAY BE LIABLE TO THE INSURED BECAUSE OF PERSONAL INJURY AND PROPERTY DAMAGE WITH RESPECT TO WHICH INSURANCE IS AFFORDED UNDER THIS POLICY OR ANY OTHER POLICY.

6.5 APPEALS IN THE EVENT THE INSURED OR ANY OTHER INSURER ELECTS NOT TO APPEAL A JUDGMENT WHICH EXCEEDS THE RETAINED OR OTHER INSURANCE LIMITS, THE COMPANY MAY ELECT TO MAKE SUCH APPEAL. THE COMPANY SHALL BE LIABLE IN ADDITION TO THE APPLICABLE LIMIT OF LIABILITY, FOR ALL COSTS, TAXES, EXPENSES INCURRED AND INTEREST ON JUDGMENTS ATTRIBUTABLE TO SUCH AN APPEAL.

6.6 LOSS PAYABLE. THE COMPANY'S LIABILITY UNDER THIS POLICY WITH RESPECT TO ANY OCCURRENCE SHALL NOT ATTACH UNTIL THE AMOUNT OF THE APPLICABLE RETAINED OR OTHER INSURANCE LIMIT HAS BEEN PAID BY OR ON BEHALF OF THE INSURED ON ACCOUNT OF SUCH OCCURRENCE. THE INSURED SHALL MAKE CLAIM FOR ANY LOSS UNDER THIS POLICY AS SOON AS PRACTICABLE AFTER:

(A) THE INSURED SHALL HAVE PAID ULTIMATE NET LOSS IN EXCESS OF THE RETAINED OR OTHER INSURANCE LIMIT WITH RESPECT TO ANY OCCURRENCE, OR

(B) THE INSURED'S OBLIGATION TO PAY SUCH AMOUNTS SHALL HAVE BEEN FINALLY DETERMINED EITHER BY JUDGMENT AGAINST THE INSURED AFTER ACTUAL TRIAL OR BY WRITTEN AGREEMENT OF THE INSURED, THE CLAIMANT AND THE COMPANY.

CLAIM FOR ANY SUBSEQUENT PAYMENTS MADE BY THE INSURED ON ACCOUNT OF THE SAME OCCURRENCE SHALL BE SIMILARLY MADE. ALL LOSSES COVERED BY THIS POLICY SHALL BE DUE AND PAYABLE BY THE COMPANY WITHIN 30 DAYS AFTER THEY ARE RESPECTIVELY CLAIMED AND PROVEN IN ACCORDANCE WITH THE TERMS OF THIS POLICY.

6.7 ACTION AGAINST THE COMPANY. NO ACTION SHALL LIE AGAINST THE COMPANY UNLESS, AS A CONDITION PRECEDENT THERETO, THE INSURED SHALL HAVE FULLY COMPLIED WITH ALL THE TERMS OF THIS POLICY, NOR UNTIL THE AMOUNT OF THE INSURED'S OBLIGATION TO PAY SHALL HAVE BEEN FINALLY DETERMINED EITHER BY JUDGMENT AGAINST THE INSURED AFTER ACTUAL TRIAL OR BY WRITTEN AGREEMENT OF THE INSURED, THE CLAIMANT AND THE COMPANY.

ANY PERSON OR ORGANIZATION OR THE LEGAL REPRESENTATIVE THEREOF WHO HAS SECURED SUCH JUDGMENT OR WRITTEN AGREEMENT SHALL THEREAFTER BE ENTITLED TO RECOVER UNDER THIS POLICY TO THE EXTENT OF THE INSURANCE AFFORDED BY THIS POLICY. NO PERSON OR ORGANIZATION SHALL HAVE ANY RIGHT UNDER THIS POLICY TO JOIN THE COMPANY AS A PARTY TO ANY ACTION AGAINST THE INSURED TO DETERMINE THE INSURED'S LIABILITY, NOR SHALL THE COMPANY BE IMPLEADED BY THE INSURED OR HIS LEGAL REPRESENTATIVE. BANKRUPTCY OR INSOLVENCY OF THE INSURED OR OF THE INSURED'S ESTATE SHALL NOT RELIEVE THE COMPANY OF ANY OF ITS OBLIGATIONS HEREUNDER.

6.8 SUBROGATION. IN THE EVENT OF ANY PAYMENT UNDER THIS POLICY, THE COMPANY SHALL PARTICIPATE WITH THE INSURED AND ANY OTHER INSURER IN THE EXERCISE OF THE INSURED'S RIGHTS OF RECOVERY AGAINST ANY PERSON OR ORGANIZATION LIABLE THEREFOR, EXCEPT AN INSURED HEREIN. RECOVERIES SHALL BE APPLIED FIRST TO REIMBURSE ANY INTEREST (INCLUDING THE INSURED) THAT MAY HAVE PAID ANY AMOUNT WITH RESPECT TO LIABILITY IN EXCESS OF THE LIMIT OF THE COMPANY'S LIABILITY HEREUNDER; THEN TO REIMBURSE THE COMPANY UP TO THE AMOUNT PAID HEREUNDER; AND LASTLY TO REIMBURSE SUCH INTERESTS (INCLUDING THE INSURED), OF WHOM THIS INSURANCE IS EXCESS, AS ARE ENTITLED TO CLAIM THE RESIDUE, IF ANY; BUT A DIFFERENT APPORTIONMENT MAY BE MADE TO EFFECT SETTLEMENT OF A CLAIM BY AGREEMENT SIGNED BY ALL INTERESTS. REASONABLE EXPENSES INCURRED IN THE EXER-

CISE OF RIGHTS OF RECOVERY SHALL BE APPORTIONED AMONG ALL INTERESTS IN THE RATIO OF THEIR RESPECTIVE LOSSES FOR WHICH RECOVERY IS SOUGHT.

6.9 CHANGES. NOTICE TO ANY AGENT OR KNOWLEDGE POSSESSED BY ANY AGENT OR BY ANY OTHER PERSON SHALL NOT EFFECT A WAIVER OR A CHANGE IN ANY PART OF THIS POLICY OR ESTOP THE COMPANY FROM ASSERTING ANY RIGHTS UNDER THE TERMS OF THIS POLICY; NOR SHALL THE TERMS OF THIS POLICY BE WAIVED OR CHANGED, EXCEPT BY ENDORSEMENT ISSUED TO FORM A PART OF THIS POLICY, SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE COMPANY.

6.10 ASSIGNMENT. ASSIGNMENT OF INTEREST UNDER THIS POLICY SHALL NOT BIND THE COMPANY UNTIL ITS CONSENT IS ENDORSED HEREON.

6.11 CANCELLATION. THIS POLICY MAY BE CANCELLED BY THE NAMED INSURED FIRST NAMED IN SECTION 1.1 OR BY THE COMPANY BY MAILING TO THE OTHER PARTY WRITTEN NOTICE STATING WHEN, NOT LESS THAN 30 DAYS THEREAFTER, CANCELLATION SHALL BE EFFECTIVE. THE MAILING OF NOTICE AS AFORESAID SHALL BE SUFFICIENT PROOF OF NOTICE AND THE EFFECTIVE DATE AND HOUR OF CANCELLATION STATED IN THE NOTICE SHALL BECOME THE END OF THE POLICY PERIOD. DELIVERY OF SUCH WRITTEN NOTICE EITHER BY THE NAMED INSURED OR BY THE COMPANY SHALL BE EQUIVALENT TO MAILING.

IF THE NAMED INSURED CANCELS, EARNED PREMIUM SHALL BE COMPUTED IN ACCORDANCE WITH THE CUSTOMARY SHORT RATE TABLE AND PROCEDURE. IF THE COMPANY CANCELS, EARNED PREMIUM SHALL BE COMPUTED PRO RATA. PREMIUM ADJUSTMENT MAY BE MADE EITHER AT THE TIME CANCELLATION IS EFFECTED OR AS SOON AS PRACTICABLE AFTER CANCELLATION BECOMES EFFECTIVE, BUT PAYMENT OR TENDER OF UNEARNED PREMIUM IS NOT A CONDITION OF CANCELLATION.

IN THE EVENT THAT THE COMPANY OR ITS AUTHORIZED REPRESENTATIVE HAS ISSUED OR MAY ISSUE, AT THE REQUEST OF THE INSURED, CERTIFICATES OF INSURANCE AND/OR STATUTORY FILINGS AND/OR OTHER EVIDENCES OF INSURANCE (HEREINAFTER REFERRED TO AS CERTIFICATES) UNDER THIS POLICY WHICH CERTIFICATES REQUIRE THE COMPANY TO GIVE ADVANCE NOTICE OF CANCELLATION TO THE RECIPIENTS OF SUCH CERTIFICATES OR OTHERS, THEN THE INSURED, IF IT SHOULD ELECT TO CANCEL THIS POLICY, SHALL GIVE THE COMPANY NOT LESS THAN THE SAME ADVANCE NOTICE OF CANCELLATION AS IS REQUIRED TO BE GIVEN BY THE COMPANY UNDER SUCH CERTIFICATES AND IN DOING SO SHALL ALLOW THE COMPANY NOT LESS THAN THREE BUSINESS DAYS FOR THE PREPARATION AND MAILING OF SUCH NOTICES OF CANCELLATION TO THE RECIPIENTS OF SUCH CERTIFICATES.

6.12 DECLARATIONS. BY ACCEPTANCE OF THIS POLICY THE NAMED INSURED AGREES THAT THE STATEMENTS IN THE APPLICATION AND IN SECTION 1. AND IN ANY SUBSEQUENT NOTICE RELATING TO UNDER-

LYING INSURANCE, WHICH ARE OFFERED AS AN INDUCEMENT TO THE COMPANY TO ISSUE AND CONTINUE THIS POLICY, ARE ITS AGREEMENTS AND REPRESENTATIONS, THAT THIS POLICY IS ISSUED AND CONTINUED IN RELIANCE UPON THE TRUTH OF SUCH REPRESENTATIONS AND THAT THIS POLICY EMBODIES ALL AGREEMENTS EXISTING BETWEEN THE NAMED INSURED AND THE COMPANY OR ANY OF ITS AGENTS RELATING TO THIS INSURANCE

ATTACHED TO AND FORMING A PART OF POLICY NO. 137030

ISSUED TO: CHESSIE SYSTEM, INC., ET AL

DATED: AUGUST 14, 1979

HARBOR INSURANCE COMPANY

BY _____
(AUTHORIZED REPRESENTATIVE)